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*Reed E. Hundt designated Charman effective November 29, 1993.
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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Brysis Data Incorporation NAL/Acct. No.: 115NF0071
City of Industry, California

Liability for Monetary Forfeiture

ORDER

Adopted: January 25, 1994; Released: February 22, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration filed by Brysis Data Incorporation (Brysis) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's July 30, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $2,000 for violating Section 302(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 302(b). As explained below, we are affirming the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $2,000.

II. BACKGROUND

3. On December 7, 1990, Brysis sold a BTI, Model AT386-25, with 65K cache personal computer for which no equipment authorization had been granted by the Commission as required by Section 15.101(a) of the Commission's Rules.

4. On March 6, 1992, the Commission's Norfolk Office issued Brysis a Notice of Apparent Liability (NAL) for violating Section 302(b) of the Act and Section 2.803 of the Commission's Rules by marketing computers that had not been granted an equipment authorization by the Commission. 47 U.S.C. § 302(b), 47 C.F.R. § 2.803. On April 1, 1991, Brysis responded to the NAL. After review of the response, the Commission's Norfolk Office issued a Forfeiture Order (NOF) on July 30, 1992, for $2,000.

III. DISCUSSION

5. Section 302(b) of the Act and Section 2.803 of the Commission's Rules prohibit the marketing of equipment capable of causing radio interference prior to grant of an equipment authorization by the Commission. As explained in the NOF, Brysis' assertion that the equipment sold was certified under a grant of authorization made to Personal Computer Associates of California (Personal Computer) is not supported by the record. Personal Computer representatives denied authorizing anyone, other than MicroStar Computer Technology, to market the device. Section 2.929(a) of the Commission's Rules, 47 C.F.R. § 2.929(a), prohibits the assignment of equipment authorizations generally. Subsection (b) does, however, allow a *grantee* of an equipment authorization to assign or otherwise authorize a second party to manufacture or market the equipment covered by the grant under certain conditions. Brysis, however, was not a second party since it was not authorized by the grantee. Brysis' submission of a letter from Infiniti Manufacturing, a distributor for Personal Computer, does not satisfy this requirement since Infiniti is not itself the grantee.

6. In the petition for reconsideration, Brysis has failed to present any other new facts or information that was not before the Commission when the NOF was issued.

7. For the reasons cited above, we affirm the finding of liability for monetary forfeiture to Brysis Data Incorporation. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, *see 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

IV. ORDERING CLAUSES

8. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), IT IS ORDERED, that Brysis Data Incorporation FORFEIT to the United States the sum of two thousand dollars ($2,000) for the willful violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules.

9. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that the forfeiture must be paid within thirty (30) days of the date of receipt of this order.[1] Payment should be made by check or money order payable to the Federal Communications Commission, attention NAL Acct. 115NF0071, and must be mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that the Field Operations Bureau send by Certified Mail, Return Receipt Requested, one copy of this Order to Brysis Data Incorporation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Advanced Computer & Engineering — NAL Acct. No. 215BM0023

Liability for Forfeiture

ORDER

Adopted: January 27, 1994; Released: February 22, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. Advanced Computer & Engineering (ACE/Petitioner) has filed a Petition for Reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the FCC's Baltimore Office November 17, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $20,000 for violating Section 302 of the Communications Act of 1934 as amended, 47 U.S.C. § 302 (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, by displaying and offering computer devices lacking FCC certification.

2. For the reasons set forth below, we have reduced the amount of the forfeiture to $7,000.

II. BACKGROUND

3. On September 29, 1992, the Commission's Baltimore Office issued a Notice of Apparent Liability based on Petitioner's September 13, 1992, display and offer for sale of various personal computers and computer systems lacking required FCC identification numbers and certification. No response to the NAL was received. On November 17, 1992, the Baltimore Office issued a Forfeiture Order finding ACE liable for a monetary forfeiture in the amount of $20,000.

4. At the time of the inspection, David Cheng, President of ACE, claimed that the equipment (a 486 50 MHz, 486 33 MHz, and 386SX 33 MHz computer systems, and a 386 33 MHz system in a desktop case) were all FCC Class B certified, but just not properly labelled. He told the inspector he would furnish the appropriate documentation. No information was provided until December 22, 1992, after issuance of the November 17, 1992, Notice of Forfeiture. A check of the Commission's data bases using the FCC ID numbers provided by Mr. Cheng showed the existence of a grant of authorization with FCC ID: IXD486-33AD, for a "Baby AT-Desktop Computer." The only 486-33 MHz computer on display at the time of inspection was a "mid-size" tower case. There was no record for "FCCID: JVD386SXIDT;" Commission records did indicate that applications for grants under similar numbers ("FCCID: JVD386SX33IDT" and "JVD386SX33IMT") were pending with the Commission. Although there was a record for a grant of authorization under FCCID HVJ3D86432, the authorization only covered a "mini tower computer", but did not cover the 386-33 MHz desktop computer that was displayed.

5. Petitioner requests cancellation of the forfeiture on the basis of its inability to pay and because the business has been dissolved. Petitioner has also submitted financial and other documents to support its claim that it is financially unable to pay because it suffered financial losses.

III. DISCUSSION AND CONCLUSION

6. We have reviewed the financial documents and documents pertaining to ACE's voluntary dissolution. Petitioner submitted a copy of a 1992 tax return which showed gross profits, but ordinary income losses. Petitioner also submitted unreviewed and unaudited financial statements prepared by its accounting firm. These financial statements, however, do not present any reliable information regarding Petitioner's financial posture. We find, however, that the 1992 tax statement provides sufficient information to justify a reduction in the amount of the forfeiture.

7. We are reducing the amount of the monetary forfeiture penalty from $20,000 to $7,000. In determining the amount of the forfeiture, the Commission's Policy regarding forfeiture adjustments, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was considered. No further adjustments appear warranted.

8. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, that the relief sought in the Petition for Reconsideration filed by Advanced Computer & Engineering, Inc. is GRANTED to the extent indicated and is otherwise DENIED.

9. IT IS FURTHER ORDERED that payment shall be made in the amount of $7,000 and that a copy of this Order shall be sent by certified mail, return receipt requested, to Advanced Computer & Engineering.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Herbert Dunphy NAL/Acct. No: 215FE0018
Oak Harbor, Washington 215FE0057

ORDER

Adopted: January 13, 1994; Released: February 22, 1994

1. Mr. Herbert Dunphy has requested review of a Forfeiture Order dated September 3, 1992, that refers to two Notices of Apparent Liability issued to him. The forfeiture is mitigated to $100.

2. Mr. Dunphy was charged with operation of an unlicensed maritime mobile radio station. See 47 U.S.C. § 301.

3. Mr. Dunphy makes no new arguments. He simply pleads for reduction or cancellation of the forfeiture. The Commission has reconsidered the usual forfeiture for the violation. Consistent with the *1993 Policy Statement, Standards for Assessment of Forfeitures,* 8 FCC Rcd 6215 (1993), the forfeiture amount for NAL/Acct. No. 215FE0018 is reduced to $100 and the forfeiture amount for NAL/Acct. No. 215FE0057 is reduced to zero.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.80 of the Commission's rules, that Herbert Dunphy pay a forfeiture of $100 within 30 days of the release of this Order.

5. Forfeiture payments shall be made by check or money order payable to the Federal Communications Commission, NAL/Acct. No.: 215FE0018, and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-289

In the Matter of

PALMETTO COMMUNICATIONS COMPANY

Licensee of Station WDIX(AM)
Yadkinville, North Carolina

Order to Show Cause Why the
License for Station WDIX(AM)
Yadkinville, North Carolina
Should Not Be Revoked

ORDER

Adopted: February 9, 1994; Released: February 22, 1994

By the Chief, Mass Media Bureau:

1. This proceeding began on November 17, 1993, when the Mass Media Bureau released its *Order to Show Cause and Hearing Designation Order*, 8 FCC Rcd 8167 (1993)(*"OSC"*). The Mass Media Bureau ordered Palmetto Communications Company ("Palmetto") to show cause why the license for WDIX(AM) Yadkinville, North Carolina, should not be revoked.[1] The Bureau specified issues to determine whether Palmetto has the capability and intent to expeditiously resume broadcast operations of WDIX(AM) and whether Palmetto violated Sections 73.1740 and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine whether, in light of the evidence adduced, Palmetto possesses the requisite qualifications to remain a Commission licensee. By *Order*, FCC 94M-30, released January 21, 1994, Administrative Law Judge, Richard L. Sippel, terminated the hearing proceeding because Palmetto failed to file the requisite notice of appearance. Pursuant to Section 1.92 of the Commission's Rules, the Judge also certified the case to the Commission.

2. The Commission's records indicate that WDIX(AM) has been off the air without authority since April 29, 1993. By letter dated November 22, 1993, the licensee notified the Mass Media Bureau of its desire to return the license of WDIX(AM). In light of the foregoing, we conclude that Palmetto has no intent to resume broadcast operations and has violated Sections 73.1740 and 73. 1750 of the Commission's Rules. We therefore further conclude that Palmetto is not qualified to remain the licensee of Station WDIX(AM).

3. Accordingly, IT IS ORDERED, that the license of Palmetto Communications Company for WDIX(AM), Yadkinville, North Carolina, IS REVOKED.[3]

4. IT IS FURTHER ORDERED , that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Mass Media Bureau has been given delegated authority to issue revocation orders in silent station cases. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-288

In the Matter of

Turner County Broadcasting, Inc.

Licensee of Station WNNQ(AM)
Ashburn, Georgia

Order to Show Cause Why the
License for Station WNNQ(AM)
Ashburn, Georgia Should
Not be Revoked

ORDER

Adopted: February 9, 1994; Released: February 22, 1994

By the Chief Mass Media Bureau:

1. This proceeding began on November 16, 1993, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 8 FCC Rcd 8165 (1993) (*"OSC"*). The Commission ordered Turner County Broadcasting, Inc. ("Turner") to show cause why the license for WNNQ(AM) Ashburn, Georgia, should not be revoked.[1] The Commission specified issues to determine whether Turner has the capability and intent to expeditiously resume broadcast operations of WNNQ(AM) and whether Turner violated Sections 73.1740 and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine whether, in light of the evidence adduced, Turner possesses the requisite qualifications to remain a Commission licensee. By *Order*, FCC 94M-08, released January 7, 1994, Chief Administrative Law Judge, Joseph Stirmer, terminated the hearing proceeding because Turner failed to file the requisite notice of appearance. Pursuant to Section 1.92 of the Commission's Rules, the Judge also certified the case to the Commission.

2. The Commission's records indicate that WNNQ(AM) has been off the air without authority since April 29, 1993. A copy of the Mass Media Bureau's Request for Admissions, sent to Turner's last known address, was returned by the United States Post Office with the notation, "Out of Business." By letter dated January 14, 1994, the licensee has indicated its desire to relinquish the license. In light of the foregoing, we conclude that Turner has no intent to resume broadcast operations and has violated Sections 73.1740 and 73.1750 of the Commission's Rules. We therefore further conclude that Turner is not qualified to remain the licensee of Station WNNQ(AM).

3. Accordingly, IT IS ORDERED, that the license of Turner h County Broadcasting for WNNQ(AM), Ashburn, Georgia, IS REVOKED.[3]

4. IT IS FURTHER ORDERED , that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary. Section 73.1750 provides:
>
> The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

[3] The Mass Media Bureau has been given delegated authority to issue revocation orders in silent station cases. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

W.A.T.C.H. TV COMPANY File No. 50134-CM-P-93

For Authorization in the Multipoint Distribution Service and for Waiver of the Commission's Rules to authorize use of Channel 2 from Channel 2A

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1994; Released: February 22, 1994

By the Chief, Domestic Facilities Division:

1. W.A.T.C.H. TV Company (WTC) has filed the captioned application requesting authority to modify its license for Multipoint Distribution Service Channel 2A (2156-2160 MHz) for station WMI390 at Lima, Ohio to operate on Channel 2 (2156-2162). WTC has also filed a request for Special Temporary Authority.

2. In support of its request, WTC states that it is serving more than 1500 subscribers on 12 channels in the Multipoint Distribution Service. WTC had planned to use its instant authorization for a 4 MHz monochrome program guide service offered in conjunction with a pay-per-view channel, and it invested over $34,000 in constructing its authorized station. However, when WTC began testing its newly constructed station, WTC discovered that the subscriber-location set-top converter boxes cannot display a visual signal transmitted over Channel 2A. Without the knowledge of WTC or the manufacturer's consultant with whom WTC had been working, the converter boxes do not contain an automatic frequency control function that would permit the display of a video carrier transmitted at the normal frequency for this function in the 2A channel, 2158.75 MHz.[1] Rather, the converter boxes require transmission of the video carrier at 2160.75 MHz, which is outside WTC's assigned 2156-2160 MHz frequency band. In order for the converter boxes to be used, WTC must have authorization for Channel 2 and the wider frequency band it offers. Accordingly, WTC requests that we grant it authority to use Channel 2 so that the existing converter boxes may be used.

3. WTC argues that the only party which could potentially be affected by its request for Channel 2 is Centel Cellular Company (now Spring Cellular Company)(SCC), one of the cellular licensees in the Toledo, Ohio MSA. SCC is authorized to use 2162 MHz for point-to-point services in connection with its cellular operations. SCC has provided its written consent for WTC to use the 2162.00 MHz frequency. WTC guarantees to protect SCC's point-to-point operations should any interference occur.

4. WTC filed a supplemental interference analysis noting that Station WML459 of the Ohio RSA5 Limited Partnership uses 2162 MHz to transmit to WML780, which is located 49.2 miles from WTC's transmitter. Upon conducting an interference analysis, WTC found that no interference would be caused to this station by the proposed modification. The desired/undesired signal ratio is 49.6 dB. Accordingly, we concur that no interference would be caused to this operation.

5. WTC requests waiver of Section 21.901(c) of the Commission's rules which state that Channel 2 will be assigned only where no harmful interference will occur to any authorized point-to-point facility in the 2160-2162 MHz band, and only if the transmitting antenna of the station is located within 10 miles of the coordinates of specified Metropolitan Statistical Areas (MSAs). While no harmful interference is indicated, WTC's operations are not within 10 miles of any of the MSAs indicated in Section 21.901(c).

6. Section 21.19(b) permits a waiver of the rules where "[t]he unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. . . ." and where applicants show "the lack of a reasonable alternative." Here, we find that there are unique facts and circumstances and that application of the rule would not be in the public interest. The unique fact here is that WTC's existing subscriber equipment will not operate on Channel 2A. Moreover, there is lack of reasonable alternative to permitting WTC to use Channel 2 because replacement of the subscriber equipment would be unduly burdensome to WTC. Waiver of the rule to permit WTC to use Channel 2 is in the public interest because WTC is providing a successful wireless cable service in the Lima, Ohio area, and because it is providing competition to a franchise cable operator, thereby "enhancing the viability of wireless cable service and its stature as a competitive force in the multichannel video delivery marketplace". *Report and Order, Wireless Cable Order,* 5 FCC Rcd 6410, at 6411 (1990). WTC represents that there are a significant number of subscribers to the service who are interested in having their service expanded in the manner requested by WTC. In addition, the only authorized user of the 2160-2162 MHz band in WTC's vicinity has granted permission for WTC to use its assigned spectrum subject to interference protection.

7. Accordingly, we find it to be in the public interest to authorize WTC to use Channel 2, rather than Channel 2A. However, because WTC's request for authorization to use Channel 2 was filed after January 16, 1992, its use of Channel 2 frequencies is on a secondary basis, pursuant to *Redevelopment of Spectrum to Encourage Innovation in the use of New Telecommunications Technologies, Third Report and Order and Memorandum Opinion and Order,* (ET Doc. No. 92-9, RM-7981, RM-8004) 8 FCC Rcd 6589 (1983).

[1] In a letter to the Commission dated May 18, 1993, the equipment manufacturer states that there is no retrofit available to modify these particular set-top converters to acquire the Channel 2A video signal.

ORDERING PARAGRAPHS

8. WHEREFORE, for the foregoing reasons, IT IS HEREBY ORDERED, pursuant to Section 316(a) of the Communications Act, as amended, that the license of MDS Station WMI390 at Lima, Ohio IS MODIFIED to specify use of Channel 2, at 2156-2162 MHz on a secondary basis only consistent with the provisions contained in ET Doc. 92-9, and a waiver is hereby granted of the location requirements for an MDS Channel 2 station at 47 C.F.R. Sec 21.901(c);

9. IT IS FURTHER ORDERED That this modification is subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in the station authorization, including a change in transmitter location, except as specified in WTC's application on FCC Form 494 (File No. 50134-CM-P-93), as supplemented. Any other changes require prior authorization after the submission of another modification application.

(b) WTC must comply with the certificate of completion of construction requirements on its authorization (to be issued separately);

(c) The modification specified in this order shall be effective the day after the certificate of completion of construction is filed PROVIDED that the certification is filed in a condition which is correct, complete and in compliance with Commission rules, and if it is accompanied by the appropriate filing fee.

10. This order is issued pursuant to Sections 0.291 and 1.87 of the Commission's Rules, 47 C.F.R. Secs. 0.291 and 1.87, and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

February 15, 1994

SOUTHERN KANSAS TELEPHONE COMPANY SEEKS WAIVER OF SECTION 69.3(f) OF THE COMMISSION'S RULES

Pleading Cycle Established

COMMENTS: March 1, 1994
REPLIES: March 7, 1994

On February 3, 1994, Southern Kansas Telephone Company (Southern Kansas) filed a petition for waiver of Section 69.3(f) of the Commission's Rules, 47 C.F.R. § 69.3(f). Southern Kansas requests waiver of Section 69.3(f)'s provision that access tariffs may be filed for a biennial period with a scheduled effective date of July 1 of any odd numbered year. Southern Kansas states that it intends to file a traffic sensitive interstate access tariff to be effective on July 1, 1994 for a one-year period and exit the National Exchange Carrier Association, Inc. (NECA) traffic sensitive pool pursuant the Commission's tariff filing requirements for small telephone companies. *See* Section 61.39 of the Commission's Rules.

Interested parties may file comments on this petition for waiver no later than March 1, 1994. Replies should be filed by March 7, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Peter Batacan, Tariff Division, Common Carrier Bureau, (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies Tariff F.C.C. No. 2	Transmittal No. 747
BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1	Transmittal No. 155
Bell Atlantic Telephone Companies Tariff F.C.C. No. 1	Transmittal No. 602
Pacific Bell Tariff F.C.C. No. 128	Transmittal Nos. 1654, 1657
NYNEX Telephone Companies Tariff F.C.C. No. 1	Transmittal No. 235
Nevada Bell Tariff F.C.C. No. 1	Transmittal No. 177
Southern New England Telephone Tariff F.C.C. No. 39	Transmittal No. 583
US West Communications, Inc. Tariff F.C.C. Nos. 1 and 3	Transmittal No. 411

ORDER

Adopted: February 10, 1994; Released: February 14, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Local exchange carriers (LECs) with special access expanded interconnection obligations were required by the *Second Reconsideration Order* to comply with the Commission's prescription for nonrecurring charge (NRC) elements by filing tariff transmittals H& due October 18, 1993.[1] That Order requires LECs providing expanded interconnection to apply nonrecurring charges that do not unreasonably discriminate between customers who use LEC-provided facilities and those that instead choose to use facilities of competitive access providers (CAPs). The NRC prescription has two elements that reflect the general expanded interconnection criteria that rate elements: (1) should reflect cost causation principles, and (2) should be sufficiently unbundled that CAPs can purchase only the elements they need.

2. Specifically, the NRC prescription first requires that any nonrecurring charge applied to customers that shift to interconnector services be set no higher than cost-based levels.[2] Similarly, any difference between the nonrecurring charges applicable to a customer who shifts to a collocator's service, and charges applicable to customers who reconfigure existing LEC service, must be cost-based. The *Second Reconsideration Order* illustrates this by stating that NRCs waived in the context of LEC reconfiguration should not be imposed on CAP-related reconfigurations, except to the extent that circuit reconfigurations for collocation demonstrably entail distinguishable costs.

3. The second, unbundling element of the prescription reflects the Commission's expectation that particular reconfiguration charge elements will recover "only the costs incurred for the particular type of reconfiguration being implemented." *Second Reconsideration Order, supra,* at 7362 n.80. Thus, for instance, customers "whose circuits are merely being rerouted within a central office" presumably will pay a lower NRC than those whose reconfiguration requires "construction of new facilities to a relocated point-of-presence." *Id.*

4. Of the carriers required to implement expanded interconnection, however, only four regional Bell Operating Companies (BOCs) -- BellSouth, Nevada Bell, Pacific Bell and SNET -- submitted transmittals presenting newly developed or repriced NRC rate elements, established to distinguish the reconfiguration costs of collocation requests from those associated with more conventional circuit reconfigurations.[3] On November 4, 1993, Teleport Communications Group, Inc. (Teleport),[4] filed a petition to reject, or alternatively, to suspend and investigate these transmittals.

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, 8 FCC Rcd 7341, 7359-7363 (1993) (*Second Reconsideration Order*).

[2] The presumption of lawfulness accorded within-band, within-cap rates is not extended to special access NRCs.

[3] In this Order we use the term "reconfiguration" to refer generally to provisioning changes that specific carriers identify by a variety of names, which may include provisioning of facilities to customer premises remote from the central office. In the case of BellSouth, however, the carrier uses "reconfiguration" more narrowly, characterizing a NRC element specifically developed to reflect only central office provisioning tasks.

[4] Teleport's petition, which was filed two days after the due date for petitions, was accompanied by a motion to accept its late filed pleading. Teleport states that key staff members were absent and unable to work on the filing and asserts that by serving the affected carriers by courier they would receive its petition no later than had it been timely filed by mail. Nevada Bell and NYNEX oppose Teleport's motion. Nevada Bell Reply at 1-2; NYNEX Reply at 2 n3. In view of the particular significance of these transmittals to expanded interconnection, and the fact that BOCs were not prejudiced by Teleport's late filing, we grant Teleport's motion and accept its petition.

to which the four BOCs replied. Pacific Bell and Nevada Bell replied on November 12, 1993; and BellSouth and SNET on November 15, 1993.[5]

5. Transmittals were also submitted on October 18 by Bell Atlantic and NYNEX, and on November 5 by US West. These transmittals do not include new rates or rate elements responsive to the NRC prescription. Teleport also seeks rejection or suspension and investigation of the Bell Atlantic and NYNEX transmittals. Those carriers replied to Teleport on November 10, 1993, and November 15, 1993, respectively. The Ameritech and US West transmittals are unopposed.[6] All these transmittals are scheduled to become effective February 15, 1994.

II. OCTOBER 18 COMPLIANCE FILINGS

6. *BellSouth.* BellSouth Transmittal 155 establishes a new and distinct reconfiguration element that is limited in scope to the costs associated with provisioning tasks performed within the central office. Separate NRC reconfiguration elements are applied to a collocator for the cross connection function and to establish a channel termination to a "remote" customer premises (*i.e.*, one outside the central office). Administrative costs associated with order processing are also recovered from a distinct element. BellSouth Transmittal 155, Description and Justification at 2-3, Appendix A.

7. Teleport contends BellSouth's rates do not appear consistent because it treats a rollover to an interconnector's service, accomplished entirely within the central office, the same as shifting a channel termination from one remote customer premises to another. Teleport also asserts that BellSouth continues to charge nothing for reconfigurations of its own customer services, while proposing to charge interconnectors for such reconfigurations. Teleport Petition at 6.

8. BellSouth replies that its reconfiguration element covers the cost of central office work associated with any new connection within the central office, and is charged in addition to the NRCs applied under its existing tariff for newly installed local channels or a cross-connect. Thus, the reconfiguration element applies equally to, for example, an interexchange carrier that changes its premises location, and to a central office shift from LEC service to an interconnector. The reconfiguration element, BellSouth states, does not average together markedly different activities, but is specific to the central office tasks that are common to reconfiguring a wholly BellSouth-provided circuit or one involving an expanded interconnection cross-connect. The provisioning tasks distinctive to each reconfiguration type are recovered by discrete, unbundled NRC elements that apply only to specific circumstances. BellSouth Reply at 1-3. As to Teleport's second contention, BellSouth asserts that the reconfiguration element applies to BellSouth customers except in the case of DS3 service, and in that instance the reconfiguration element does not apply to interconnector arrangements either. *Id.* at 3-4.

9. *Nevada Bell.* Nevada Bell Transmittal 177 establishes new nonrecurring "rollover change" rate elements. The costs of providing these elements were determined by questioning subject matter experts on the tasks and labor time necessary for accomplishing the rearrangements. These "rollover change" elements are distinct from NRC elements applied to moves and new service installations: the rollover elements apply to collocation requests for existing special access services as well as to reconfigurations within the central office of existing LEC arrangements. Nevada Bell Transmittal 177 Description and Justification at 1-4; Nevada Bell Tariff F.C.C. No. 1, fifth revised page 229.4-229.5.

10. Teleport contends that Nevada Bell's tariff includes "extraordinarily high" rates for rearrangements, though comparatively little work is involved, and limits the application of the "rollover change" element to situations in which a single channel is to be terminated on a cross connect element. According to Teleport, Nevada Bell fails to provide for the connection of multiplexed service to expanded interconnection. Teleport Petition at 5-6. Nevada Bell replies that Teleport has not attempted to identify the specific costs that are allegedly overstated, though the Nevada Bell transmittal includes an itemized listing of the costs included in its NRC elements. Nevada Bell Reply at 2. As to the connection of multiplexed service to an interconnector, Nevada Bell states that because such a rearrangement would involve a change in point of termination, from a customer's premises to the expanded interconnection service provider's point of termination in the central office, it involves a change in the channel termination rate element and the rollover nonrecurring charge would apply. Nevada Bell Reply at 2-3, Nevada Bell Tariff F.C.C. No. 1, Sec. 7.2.2(C)(3) (fifth revised page 229.4).

11. *Pacific Bell.* Pacific Bell Transmittal 1657 establishes new "rollover change" NRC elements and provides cost support for existing rollover change elements, so the different rollover charges applicable to collocation requests and those applicable to reconfigurations involving only Pacific circuit elements are each cost-based. Pacific restructures its existing rollover change element to include reconfigurations that involve rollovers to existing special access or expanded interconnection service, and so entail a change in point of termination. The new rate elements allow Pacific Bell to recover the additional costs of such reconfigurations, while still distinguishing the existing rollover change element from "service changes" and other NRC classifications applicable to other provisioning situations. Pacific Bell Transmittal 1657 Description and Justification at 2-1 ff.

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[5] In its earlier Transmittal 1654, filed September 17, 1993, Pacific removed a limitation on application of its rollover regulations, so they could apply to reconfigurations involving a change in central offices (but not in point of termination). At that time Pacific did not, however, extend that provision to treat interconnectors similarly. MFS Communications filed a petition to reject that transmittal. Pacific subsequently filed Transmittal 1657 to implement the NRC prescription. MFS did not protest this filing, which extended the rollover provision to encompass interconnectors. In view of Pacific's revisions filed in Transmittal 1657, we dismiss the MFS petition as moot. *See* para. 21, *infra*.

[6] Ameritech Transmittal 747 revises some provisions and the duration of its reconfiguration waiver program; US West Transmittal 411 establishes a temporary, partial waiver of NRC elements to CAP and LEC customers alike who undertook network reconfiguration.

12. Teleport asserts that while Pacific Bell would apply two different rates for reconfigurations, depending on whether a change in point of termination is involved, it fails to explain when the different charges will apply. Teleport Petition at 4. Teleport also contends that Pacific has not adequately explained the additional costs involved when the point of termination changes, including the dispatch of technicians to remote points of termination and the need for work orders to disconnect the "rolled over" circuit, as that circuit is not changed by the rollover. *Id.* at 5.

13. Pacific Bell replies that Teleport has failed to apply the definition of "point of termination" set forth in the tariff. Under that definition, according to Pacific, the higher reconfiguration NRC will apply both to end-to-end Pacific Bell special access circuits and to expanded interconnection service, including the shift to collocated facilities that the Commission has recognized entails a changed point of termination. Pacific notes that the lower of the two rates will apply whenever an access customer, including a CAP, orders a rollover of existing service that does not require a change in point of termination. Pacific Bell Reply at 3-5, *citing* Pacific Bell Tariff F.C.C. No. 128, Sec. 2.6, *and Second Reconsideration Order*, 8 FCC Rcd at 7359, para. 42.

14. Pacific states that when a point of termination changes, it dispatches a technician to the customer's premises to relabel and test the reconfigured circuit, in order to facilitate subsequent repair or changes in service, and to keep premises labels consistent with circuit inventory records. Pacific adds that these same functions and correspondingly higher rollover charges are applicable to special access service provided entirely by Pacific, when the customer rolls over to a different end-to-end special access service. In contrast, absent a change in point of termination, the lower rollover rate applies because a technician need not be dispatched, and this rate is also applicable to the CAP in that situation. Pacific Bell Reply at 5-7. Regarding Teleport's assertion that the rolled over circuit does not change, Pacific replies that the circuit segment connected to the CAP facility is not the segment that is disconnected to enable the rollover, and states that the same functions and costs are applicable to rollovers between different end-to-end services provided by Pacific. Similarly, the lower charge for rollovers not requiring a change in termination does not require service disconnection or reconnection, so the lower charge applies to interconnectors as well in that circumstance. *Id.* at 8-9.

15. *SNET.* SNET states that its current tariff provisions would impose a full installation NRC for the reconfiguration of special access service to interconnector facilities, and establishes by Transmittal 583 new NRC elements, styled "retermination charges," to implement the NRC prescription. SNET provides cost support for its existing DS1 rollover charge, which applies when a customer reconfigures service without a change in point of termination, and also provides support for the additional, one-time work effort involved when a customer reterminates existing SNET service to the interconnector's cross-connect termination. The distinct tasks associated with this latter work function are specified in workpapers, and costs were developed from estimated labor times. SNET Transmittal 583 Description and Justification (unpaginated).

16. Teleport contends that SNET's transmittal would establish discriminatory charges for rollovers, because rollovers to interconnector facilities are more expensive than those within the SNET network. Teleport asserts that SNET's rationale for the different retermination charges, based on the change in point of termination and the second work order that SNET asserts is associated with the CAP rollover, is unjustified. Teleport states that a rollover involving only LEC circuit components requires a "point of termination" change on the main distribution frame, which is no different than when SNET makes such a change in a CAP-related rollover. Teleport Petition at 6-7.

17. Regarding Teleport's discrimination contention, SNET replies that its retermination charges recover a different work function than current rollover charge elements. The rollover charge applies to less complex reconfigurations that do not entail a changed point of termination, and involve only a single service order and record update; in contrast, the retermination charge applies to reconfigurations that additionally require a service disconnect and subsequent installation. SNET states that the point of termination does not change when a SNET customer rolls over a DS1 facility to, *e.g.*, a multiplexer in the central office, but does change when the existing DS1 is instead reterminated to the interconnector's cross-connect termination. SNET Reply at 2-3.

III. OTHER OCTOBER 18 TRANSMITTALS

18. *Bell Atlantic.* Bell Atlantic Transmittal 602 clarifies the application of established special access rate elements by distinguishing installation of new service and "service change" rate elements from "service rearrangements" that include, among other reconfiguration scenarios, the customer's request that service be moved to a collocated CAP. Bell Atlantic Transmittal 602, Description and Justification at 1-3. Transmittal 602 does not, however, establish or revise any NRC elements applicable to collocation requests or otherwise unbundle the existing special access NRC structure.

19. Teleport states that Bell Atlantic fails to meet the Commission's non-discrimination standard because it applies the same NRC element (and charge) to the installed cross connection element, provided wholly within the central office, as to an entire channel termination, which commonly involves provisioning of outside plant to reach the customer's premises. Teleport also contends that Bell Atlantic has not proposed nondiscriminatory NRCs for reconfigurations entirely within a central office because it does not allow Intellimux connections to be rolled over as it does channel terminations and multiplexed connections.[7] Teleport Petition at 7-8. Bell Atlantic replies that the challenged special access NRC element was established and subsequently applied to collocation in the February 16, 1993 tariff filing by Bell Atlantic, so Teleport's objection on that ground is untimely. As to the Intellimux rollover, Bell Atlantic states it did not initially specify that the same rearrangement charges would apply to collocators taking

[7] Intellimux enables customers to reconfigure individual special access channels within a High Capacity service connected at digital cross connect systems. Customers access the Intellimux host computer from a terminal at their premises, and so avoid normal service order procedures. Bell Atlantic Tariff F.C.C. No. 1, Sec. 7.2.12(A), second revised page 316.6.

Intellimux service as would apply to other services, because it was not aware collocators would need that service, but will now make it available on request under the same rearrangement charge. Bell Atlantic Reply at 1-2.

20. *NYNEX.* By Transmittal 235, NYNEX modifies its present NRC practice by establishing a six-month installment payment option for interconnector customers required to pay distinct nonrecurring charge elements. NYNEX does not alter its practice of charging LEC customers nothing for their reconfigurations to other LEC facilities, recovering those costs instead from the recurring rate elements for specific services; nor does Transmittal 235 otherwise unbundle or revise NRC rate elements.

21. Teleport states that NYNEX ignores the nondiscrimination requirement of the NRC prescription by charging interconnectors the full NRC for reconfigurations while charging its own retail customers nothing, and overlooks the fact that it will continue to receive recurring revenues from channel terminations that remain attached to the cross-connection. Teleport Petition at 2-4. NYNEX replies that the *Second Reconsideration Order* did not find the existing NRC structure violative of the Communications Act, and states that there is no double recovery involved when customers take the cross-connection element. If NYNEX imposed a nonrecurring element on its own customers, it argues, the interconnector's flexibility to recover nonrecurring charges from recurring elements would place NYNEX at a clear competitive disadvantage. If NYNEX charged nothing for reconfigurations to an interconnector, it would effectively be subsidizing its competitor. NYNEX Reply at 2-4.

IV. DISCUSSION AND ORDERING CLAUSES

22. The Common Carrier Bureau has reviewed the transmittals filed by BellSouth, Nevada Bell, and Pacific Bell, SNET, Bell Atlantic and NYNEX, as well as Teleport's petition and these carriers' replies. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection and that no question has been presented that warrants investigation of these transmittals at this time.[8] As the Bell Atlantic and NYNEX transmittals do not involve new rates or rate elements responsive to the NRC prescription, we will examine their NRC structures for compliance with the *Second Reconsideration Order* prescription in a subsequent Order.[9]

23. Accordingly, IT IS ORDERED that Teleport's motion to accept its late filed pleading IS GRANTED.

24. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, Transmittal No. 155; Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 602; Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1657; NYNEX Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 235; Nevada Bell Tariff F.C.C. No. 1, Transmittal No. 177; and Southern New England Telephone Tariff F.C.C. No. 39, Transmittal No. 583, filed by Teleport Communications Group, Inc., IS DENIED.

25. IT IS FURTHER ORDERED that the petition to reject Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1654, filed by MFS Communications Company, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[8] While we are permitting the captioned transmittals to become effective, this disposition does not constitute a finding that the NRC elements established by October 18 compliance filings, or the specific rates charged, are lawful. Previously established NRC elements, as noted in text, are not considered by this order. Thus, the scope of discussion here should not be construed as approval or acceptance of existing NRC elements tariffed by carriers that have not yet complied with the NRC prescription. The Bureau is committed to enforcing the NRC rate element prescription and expects carriers subject to the prescription will promptly make any tariff revisions necessary to comply with the Commission's Order.

[9] Other carriers subject to the NRC prescription have not yet filed compliance transmittals. We will consider those carriers' transmittals, once filed, in a subsequent Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-129

In the Matter of

800 Data Base Access Tariffs and the

800 Service Management System Tariff

ORDER

Adopted: February 14, 1994; Released: February 14, 1994

By the Chief, Tariff Division, Common Carrier Bureau

1. On July 19, 1993 the Bureau released an Order,[1] designating issues in our investigation of the 800 data base access tariffs. That order set deadlines by which oppositions to the local exchange carriers' (LECs) direct cases had to be filed. On August 5, October 18, and November 30, 1993 and January 4, 1994, the Tariff Division released orders, each of which extended the time for filing pleadings responding to the LECs' direct cases. Currently, replies are due on February 15, 1994 and rebuttals are due on February 28, 1994. On February 9, 1994, the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a motion to extend the time for filing comments until thirty days following the filing of the LECs' complete direct cases.

2. Several LECs filed petitions for waiver of the cost disclosure requirements of paragraph 29 of the *Designation Order*.[2] On January 31, 1994, the Bureau released an order denying those petitions for waiver. Ad Hoc contends that interested parties need an extension of time, until thirty days after the LECs complete their direct cases, to permit them to review that additional information and prepare their responses.

3. The Division has reviewed Ad Hoc's request for an extension of time and has determined that good cause has been shown to grant an extension to all parties. Therefore, price cap LECs that wish to file additional cost support or arrange for the release of their cost models under protective agreements must do so by March 15, 1994. Given the length of time this proceeding has been pending, we anticipate granting no additional time for parties to provide all information requested in this proceeding. Oppositions or comments on direct cases will be due on April 15, 1994. Rebuttals to oppositions or comments will be due on April 28, 1994.

4. Accordingly, IT IS ORDERED that the petition for extension of time filed by Ad Hoc Telecommunications Users Committee IS GRANTED, to extend the deadlines for all parties in this proceeding to file revised cost support, arrange for the disclosure of their cost models or file pleadings responding to direct cases, and rebuttals, as specified in paragraph 3 of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] *800 Data Base Access Tariffs and the 800 Service Management System Tariff, Order Designating Issues for Investigation*, CC Docket 93-129, 8 FCC Rcd 5132 (1993) (*Designation Order*).

[2] *See also Public Notice, Participating Bell Operating Companies, US West and GTE Request Waivers of Requirement to Disclose Cost Support*, CC Docket 93-129, 8 FCC Rcd 7328 (1993) (established pleading cycle for comments on LEC petitions for waiver of cost disclosure requirements in this proceeding).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

February 15, 1994

COMMON CARRIER BUREAU ESTABLISHES PLEADING CYCLE FOR ZONE DENSITY PRICING PLAN FILED BY CINCINNATI BELL TELEPHONE CO.

COMMENTS DUE: MARCH 4, 1994
REPLY COMMENTS DUE: MARCH 18, 1994

On January 12, 1994, Cincinnati Bell Telephone Company (CBT) filed a zone density pricing plan pursuant to the Commission's *Special Access Order*.[1] This public notice establishes a schedule for the filing of comments and reply comments concerning CBT's zone density pricing plan.

CBT has also provided supplemental information headed "Supplemental Filing in Support of Cincinnati Bell Telephone Company's Density Zone Pricing Plan," filed on February 4, 1994.

All comments concerning CBT's zone density pricing plan, which includes CBT's supplemental filing, must be headed "Comments of [commenter's name]." The caption of all pleadings concerning CBT's zone density pricing plan must read:

In the Matter of

Cincinnati Bell Telephone Co.

Zone Density Pricing Plan

The Docket Number in this proceeding, CC Docket No. 91-141, is identical to the docket number used in the LEC expanded interconnection proceedings. We remind commenters, however, that pleadings concerning CBT's zone density pricing plan must be filed separately from pleadings concerning the LECs' expanded interconnection tariffs.

Comments on CBT's zone density pricing plan, which includes CBT's supplemental filing, must be filed no later than March 4, 1994. CBT's reply must be filed no later than March 18, 1994. An original and four copies of all comments and replies must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to ITS, Inc., the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 [in Room 246, 1919 M Street, N.W., Washington D.C. 20554,] and four copies to the Chief, Tariff Division, Room 518, 1919 M. Street, N.W., Washington, D.C. 20554.

For further information contact Debra Sabourin, Common Carrier Bureau, Tariff Division at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, and Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket No. 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Special Access Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Bell Atlantic Transmittal No. 613
Telephone Companies
Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 1994; Released: February 14, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On November 18, 1993, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 613 to revise certain terms and conditions associated with its special access collocation tariff, which, *inter alia*, allows Bell Atlantic to calculate some estimated construction charges on a time and materials basis. This transmittal will: (1) allow all subsequent collocators at a given location, regardless of when they establish service, to pay a prorated portion of the common nonrecurring charges associated with central office preparation; (2) provide an estimate of construction charges within 25 working days of request by a potential collocator; and (3) clarify that rearrangement charges associated with IntelliMux[1] are available to all users of the service, including collocators. Transmittal 613 is scheduled to take effect on February 15, 1994.

2. On December 13, 1993, MFS Communications Company, Inc. (MFS) filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 613. On December 23, 1993, Bell Atlantic filed its reply. MFS contends that Bell Atlantic, by submitting estimates of construction charges to potential collocators, will establish the charges through an independent contract rather than by filing tariff revisions. MFS characterizes Bell Atlantic's filing as an individual case basis (ICB) rate, and asserts that it violates the prohibition against ICB pricing of special access collocation rate elements set forth in the *Expanded Interconnection Tariff Order*.[2] MFS at 1-2.

3. Bell Atlantic replies that it will file the actual construction charges in its collocation tariff after construction is completed, instead of filing the estimate before start of construction. According to Bell Atlantic, collocators request changes in specific features during construction which would necessitate filing a number of revisions to the price estimates. Therefore, argues Bell Atlantic, filing actual charges after construction is completed will eliminate the need to file a number of tariff revisions and will allow it to expeditiously accommodate collocators' requests for customized construction. Bell Atlantic Reply at 1-2.

4. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*. Therefore, Transmittal No. 613 is suspended for one day until February 16, 1994, and will be subject to the investigation initiated in the *Expanded Interconn ection Tariff Order*.[3] These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

5. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 613, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

6. IT IS FURTHER ORDERED that Bell Atlantic SHALL FILE tariff revisions within five business days of the effective date of this order to reflect this suspension.

7. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Bell Atlantic should cite the "DA" number of the instant Order as the authority for this filing.

8. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Bell Atlantic shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Intellimux service allows customers to manage and reconfigure the network of their voice grade service, Digital Data Service, and/or individual channels within a 1.544 Mbps channel.

[2] Ameritech Operating Companies, *et. al*, 8 FCC Rcd 4589, 4600 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*), *citing* Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369, 7442. In the *Expanded Interconnection Tariff Order*, the Bureau ordered Bell Atlantic, and any other LEC that tariffed physical collocation rate elements as an ICB, to delete references to ICB charges from their physical collocation tariffs and tariff either specific rates or time and materials charges for those rate elements. *Expanded Interconnection Tariff Order*, 8 FCC Rcd at 4600.

[3] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

US WEST, INC.,	File No. E-89-038
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-91-030
INDIANA BELL TELEPHONE COMPANY,	File No. E-91-031
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-032
THE OHIO BELL TELEPHONE COMPANY, and	File No. E-91-033
WISCONSIN BELL, INC.,	File No. E-91-034

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1993; Released: February 23, 1994

By the Commission: Chairman Hundt not participating.

I. INTRODUCTION

1. The Commission has before it petitions filed by Allnet Communication Services, Inc. (Allnet) seeking reconsideration of our actions in *Allnet Communication Services, Inc. v. US West, Inc.* (*USWC Damages Order*)[1] and *Allnet Communication Services, Inc. v. The Ameritech Operating Companies* (*Ameritech Damages Order*)[2] (together the *Damages Orders*). Allnet seeks reconsideration of the Commission's damages determination with respect to defendant USWC and the Commission's denial of its Section 202(a) discrimination claims. For the reasons set forth below, we grant, in part, Allnet's request that we adjust its damages award from USWC. In all other respects, the petitions are denied.

II. BACKGROUND

2. In the *Damages Orders*, we held that Allnet had met its burden of establishing that the defendant local exchange carriers (LECs) had violated Section 201(b) of the Communications Act of 1934, as amended (the "Act"),[3] by earning in excess of the Commission's prescribed rate of return in one or more access service categories for the periods October 1, 1985 through December 31, 1986 in the case of USWC and January 1, 1987 through December 31, 1988 in the case of Ameritech.[4] We found that Allnet was entitled to recover monetary damages from defendants to the extent it established that it suffered actual damages as a consequence of the defendants' violations.[5] We also held that Allnet is entitled to prejudgment interest on its damages awards.[6]

3. In addressing Allnet's damages claims, we found it appropriate to look in the first instance at the difference between the amounts Allnet actually paid for defendants' access services during the relevant periods and the amounts it would have paid if the defendants' rates had produced earnings within the prescribed levels.[7] The defendants, however, were permitted to offset damages claims by showing that Allnet benefitted from underpayments for other access services during the same monitoring period.[8]

4. After analyzing the evidence and arguments presented by the parties, we awarded Allnet damages totalling $168,781 in the case of USWC.[9] In deriving these amounts, we made adjustments to damages computations submitted by Allnet based on what we determined to be Allnet's failure to use the proper maximum allowable rate of return in measuring the defendants' overearnings.[10] We also faulted Allnet's computations for failure to include offsets attributable to NWB underearnings in the state of South Dakota.[11] We similarly rejected rate of return computations presented by USWC in the switched traffic sensitive category because they improperly included certain Information and Intercept rate elements.[12] Because we believed that Allnet had also included these elements in their calculations, we adjusted Allnet's calculations to exclude these elements.

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[1] 8 FCC Rcd 3017 (1993). Allnet originally initiated this complaint proceeding against US West, Inc. and its former operating subsidiaries: Mountain States Telephone and Telegraph Company (MTN), Northwestern Bell Telephone Company (NWB), and Pacific Northwest Bell Telephone Company. These companies were later consolidated into a single company, US West Communications (USWC). *See* 5 FCC Rcd 1982 (1990). For convenience, we will refer to the former operating subsidiaries collectively as USWC and individually by their former names where appropriate.

[2] 8 FCC Rcd 3030 (1993). The defendants in this complaint proceeding are the Ameritech Operating Companies: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. For purposes of this proceeding, Ameritech filed consolidated pleadings on behalf of each of its operating companies. For convenience, we will refer to the defendants collectively as Ameritech.

[3] 47 U.S.C. § 201(b).

[4] *See USWC Damages Order*, 8 FCC Rcd at 3019; *Ameritech Damages Order*, 8 FCC Rcd at 3034.

[5] *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3022-3023.

[6] *Id.* at 3023-3024.

[7] *Id.* at 3024.

[8] *Id.*

[9] *Id.* at 3023.

[10] *See Id.* at 3023. Allnet had computed damages totalling $221,000 for USWC.

[11] *See id.* We also adjusted Allnet's computations to the extent Allnet applied a marginal rather than effective tax rate to derive its claimed damages amounts. *Id.* Allnet does not seek reconsideration of this adjustment.

[12] *Id.*

5. We also rejected claims by Allnet that Commission rules and decisions pertaining to equal access require the defendants to provide it intraLATA, interstate presubscription.[13] We noted that the Commission has not required the Bell Operating Companies or other LECs to provide dial-1 access for interstate, intraLATA MTS calls as part of the presubscription process.[14] We held that Allnet had failed to establish that the defendants' failure to provide intraLATA, interstate presubscription constitutes unjust and unreasonable discrimination within the meaning of Section 202(a) of the Act.[15] In addition, we rejected Allnet's alternative claim that Commission rules and decisions require that it be assessed non-premium access charges because of the defendants failure to provide dial-1 service.[16]

III. DISCUSSION

A. Damages

1. Contentions of the Parties

6. In its petition, Allnet seeks reconsideration of the Commission's downward adjustment of its damages computations with regard to USWC. According to Allnet, the Commission improperly made the adjustments because it erroneously determined that Allnet had failed to use the prescribed 13.25% maximum allowable rate of return for purposes of measuring the defendants' overearnings.[17] Allnet points out that the damages calculations set out in its Corrected Initial Brief properly used the 13.25% maximum and 12.75% minimum rates of return. Allnet further contends that the Commission erred by adjusting USWC's offset computations upward to include underearnings by NWB in the state of South Dakota.[18] Allnet argues that because NWB filed separate tariffs and Forms 492 for each state where it provided service, NWB is required to plead offsets on an individual state basis and cannot offset overearnings in one state with underearnings in another.[19] Allnet argues that taking into account the Commission's proper correction of Allnet's use of effective rather than marginal tax rates, its damages from USWC should be $221,000, plus accumulated interest, and not the $168,781 amount determined by the Commission.[20]

7. In its opposition, USWC states that it does not comprehend Allnet's arguments or the Commission's determination that damages are appropriate. In addition, USWC argues that the only way to accurately assess USWC's earnings is on a total company basis or to litigate in appropriate proceedings under Section 407 of the Act.[21]

2. Discussion

8. After careful consideration of the facts and arguments presented by the parties, we grant, in part, Allnet's request for reconsideration of its damage award from USWC. Our review of Allnet's Corrected Initial Brief does show that Allnet did provide damages computations using the proper 13.25% maximum allowable rate of return and that the information contained in this filing provides a basis for a more accurate assessment of Allnet's damages claims. We note at the outset, however, that our initial determination that Allnet had used an improper rate of return was based on what can only be described as inconsistent and contradictory data submitted by Allnet during this proceeding. Each party was required to file initial briefs and reply briefs fully setting forth evidence and arguments in support of its damages claims.[22] In its reply brief, Allnet presented revised damages computations that differed substantially from those in its Corrected Initial Brief. This was done apparently in an effort to counter the damages arguments presented by USWC regarding the appropriate analysis of its earned rate of return during the relevant period. Even so, Allnet made no apparent attempt to explain or even point out the substantial divergences in this latter evidentiary submission. Our review of this submission persuaded us that, in addition to improperly using a marginal tax rate and failing to include offsets attributable to underearnings in South Dakota, Allnet had understated the defendants' maximum allowable rate of return. We made adjustments accordingly based on the record evidence provided by Allnet and the defendant.

9. Allnet now contends in its petition that the adjustments were not appropriate because it applied the correct rate of return in deriving the damages figures contained in its Corrected Initial Brief and the Commission should have relied on those figures in considering its damages claims. While we find it appropriate in this particular case to readjust Allnet's damages based on Allnet's clarification,[23] we emphasize that in a Section 208 complaint proceeding, the Commission should not and cannot be expected to decipher or sort out the inconsistent or contradictory submissions on a complainant's behalf as Allnet seems to suggest.[24] Allnet is reminded that it was charged with the responsibility of ensuring and maintaining the completeness and accuracy of its submissions and could well have served its interest better by explaining the substantial inconsistencies in its initial and reply briefs in the underlying proceeding. In any event, we have taken into account the information provided in Allnet's Corrected Initial Brief and find it appropriate to readjust Allnet's damages award from USWC by $36,757. This amount represents our previous disallowance based on our determination that Allnet had understated USWC's maximum allowable rate of return and improperly included the Information and Intercept rate element data developed by

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[13] *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3025-3026.
[14] *Id.* at para. 37.
[15] *Id.* at para. 38.
[16] *Id.* at para. 42.
[17] Allnet Petition for Reconsideration (Allnet Petition) at 13-14.
[18] *Id.* at 14.
[19] *Id.*
[20] *Id.* at 14.
[21] *Id.*
[22] *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3018, para. 4.
[23] We note that USWC has presented no evidence to counter Allnet's claim that the damages figures contained in its Corrected Initial Brief were derived using the correct maximum allowable rate of return.
[24] It has long been established that the complainant in a Section 208 complaint proceeding bears the burden of proof on the issues of liability and damages. *See* MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Company, 5 FCC Rcd 216 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

USWC in its damages calculations.[25] After reviewing Allnet's computations, we have concluded that Allnet used the correct data in calculating its damages.

10. We reject, however, Allnet's request for additional adjustments based on its claim that it was improper for NWB to apply offsets based on underearnings in South Dakota to overearnings in other states. Allnet does not contend that it did not purchase interstate access services from NWB in South Dakota during the relevant period or that it did not benefit from NWB's underearnings. Our decision to consider offsets recognizes that although a complainant may have a legitimate claim for damages as a result of a LEC's violation of the rate of return prescription, the complainants may have enjoyed significant offsetting benefits in the form of lower rates as well.[26] Allnet has provided no plausible rationale for its suggestion that such benefits should not be considered in the aggregate if the purchases occurred in multiple states covered by separate tariffs.

B. Equal Access

1. Contentions of the Parties

11. Allnet next contends that the Commission erred by concluding that the defendants' failure to provide Allnet with the same dial-1 interstate, intraLATA access that they provide themselves does not constitute unreasonable discrimination within the meaning of Section 202(a) of the Act.[27] Allnet claims that the Commission made this determination based on an erroneous and unsupported conclusion that the discrimination is one that cannot be eliminated.[28] According to Allnet, technology exists that will allow an end user the option of either presubscribing its intraLATA toll calls to its interLATA carrier or of maintaining the status quo arrangement -- presubscribing to the LEC for intraLATA, interstate calling, while presubscribing to the interexchange carrier (IXC) for interLATA, interstate calling.[29] Allnet argues that the ability to make available several routing alternative arrangements in the same switch is demonstrated by the Commission's prior experience with unscreened and unbanded WATS access lines.[30]

12. Allnet argues that the Commission could not properly make technical switch capabilities an issue after it denied discovery by Allnet on the issue and the existence or nonexistence of such capabilities was not a part of USWC's or Ameritech's defense.[31] Allnet maintains that the Commission went outside the record in reaching its conclusions and afforded Allnet no opportunity to demonstrate that these findings are erroneous.[32] Allnet also argues that there was no evidence in the record that supports the Commission's conclusion that the administrative costs of providing dial-1 intraLATA, interstate equal access would be particularly burdensome. Allnet contends that the Commission has previously ordered identical access requirements without such concern for cost. Allnet posits that irrespective of costs, competition would drive all carriers to educate and inform each customer free of charge.[33]

13. In their oppositions, Ameritech and USWC contend that Allnet's petition is simply a reiteration of the arguments contained in its original complaint that were previously rejected by the Commission. Ameritech also argues that the Commission appropriately took official notice of its knowledge of presubscription before arriving at a decision on the merits of Allnet's claim. According to Ameritech, the Commission may appropriately take official notice of "technical or scientific facts which are within the agency's area of expertise."[34] Thus, Ameritech and USWC argue, the Commission correctly found that requiring equal access to 1+ dialing for intraLATA, interstate calling would have the practical effects of excluding LECs from the intraLATA, interstate market and of introducing significant costs and complexity into the presubscription process.[35] Finally, Ameritech argues that the Commission may have limited jurisdiction over a significant portion of intraLATA, interstate service and should disregard this attempt to introduce 1+ dialing in intraLATA, interstate toll service.[36] USWC points out that Allnet ignores the essential fact that USWC may not lawfully provide any interLATA service.

14. In reply, Allnet disputes Ameritech's claim that the Commission properly took official notice of technical and scientific facts within its expertise in making the determination in the *Damages Orders* that 1+ presubscription for intraLATA, interstate calling is not technically feasible.[37] According to Allnet, the defendants neither claimed that they would be barred from participating in the intraLATA market if intraLATA, interstate presubscription is required nor raised technical capability

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[25] *See* para. 4 *supra*.

[26] *See* MCI Telecommunications Corporation v. Pacific Bell Telephone Company, 8 FCC Rcd 1517 (1993).

[27] Allnet Petition at 4, paras. 7-13.

[28] *Id.* at 7 (citing *Ameritech Damages Order*, 8 FCC Rcd at 3043; *USWC Damages Order*, 8 FCC Rcd at 3025).

[29] *Id.* at 8.

[30] Allnet maintains that in 1986 the Commission ordered identical access requirements for WATS customers without concern for the cost of eliminating the discrimination that existed prior to that change. Allnet does not provide a specific citation to support its contention but simply refers in general to MidYear 1986 Access Tariff Filings, CC Docket No. 86-181. We presume, however, that Allnet is referring to the Commission's Memorandum Opinion and Order, Mimeo No. 4621 (released May 20, 1986), *recon. denied*, 1 FCC Rcd 1247 (1986). Allnet contends that as a result, there exists multiple alternative configurations of switched WATS access lines that enable some or all intraLATA traffic to be routed to the interLATA carrier. *Id.* at 8.

[31] Allnet posits that there are switch vendors ready, willing, and able to provide the software for intraLATA equal access by employing generic software packages that provide another means of providing dial-1 intraLATA access. *Id.* at 12.

[32] *Id.* at 11.

[33] *Id.* at 12.

[34] Ameritech Opposition at 4-5 (citing Advanced Business Communications, Inc., 2 FCC Rcd 3751, 3752, para. 17 (1987) (*Advanced Business*).

[35] Ameritech Opposition at 5, n.15; USWC Opposition at 2 (citing *USWC Damages Order* at para. 39).

[36] *Id.* (citing *Ameritech Damages Order* at para. 6).

[37] Allnet/Ameritech Reply at 5, n.5. Allnet argues that Ameritech's reliance on *Advanced Business* is misplaced because that case stands for the proposition that the Commission may take notice of commonly known facts. Allnet states that it is not aware of any commonly known fact that would support the Commission's conclusions in this case and argues the Commission cannot invent facts that the parties have neither accepted or discussed.

as an issue.[38] According to Allnet, Ameritech conceded in its opposition that existing technology allows end users to have one carrier for 1+ intraLATA, interstate traffic and another carrier for 1+ interLATA, interstate traffic.[39] Thus, Allnet argues, there is no basis for the conclusion that existing technology will not allow an end user to maintain the status quo as an option or that LECs would effectively be excluded from the intraLATA market if intraLATA equal access is required.

2. Discussion

15. Initially, we note that Allnet does not challenge our determination in the *Damages Orders* that the Commission has not, as part of the presubscription process, required the Bell Operating Companies or other LECs to provide "1+" access for interstate, intraLATA MTS calls.[40] The crux of Allnet's argument on reconsideration is that there is no support in the record for a conclusion that the defendants' failure to provide such access is not unreasonably discriminatory under Section 202(a).[41] Contrary to Allnet's assertions, our determination was not based on a finding that switching capabilities made it technically impossible for the defendants to provide dual or multicarrier presubscription. Rather, we concluded that while dual presubscription may not be technically impossible, it would likely entail significant administrative costs and added complexity both in terms of changing presubscription procedures and in educating consumers with a different access routine.[42] We properly based our determination on the limited record before us as well as our experience and familiarity with issues bearing on intraLATA, interexchange access. While Allnet challenges the accuracy of these conclusions,[43] we find no basis in the record for a ruling that the defendants have acted in an unlawfully discriminatory manner under the circumstances of this case. Even accepting Allnet's claims regarding the defendants' technical capabilities, the fact that we have not previously required the defendants or other LECs to provide intraLATA, interstate presubscription, coupled with our determination that such a requirement would entail some changes in presubscription procedures and access routines, militates against a finding of unlawful discrimination in this case. Moreover, as we stated in the *Damages Orders*, the issue whether dial-1 presubscription for intraLATA, interstate calling should be required is more appropriately addressed in the context of a rulemaking proceeding in which all interested parties would have the opportunity to participate.[44]

16. Finally, Allnet's contention that the Commission improperly made switching capabilities an issue because the staff had previously acted to foreclose discovery on the issue is unavailing. The only discovery sought by Allnet regarding switch capabilities was a single interrogatory requesting Ameritech to identify all correspondence between it and major equipment suppliers relating to intraLATA dial-1 equal access capabilities.[45] Ameritech objected to providing the requested information on the grounds that it was contending that it was not required to provide dial-1 access to Allnet, not that it was incapable of providing the service. The Bureau's Enforcement Division subsequently denied, *inter alia*, Allnet's motion to compel a response to the interrogatory in light of Ameritech's denial that switch capabilities were the reason it did not provide dial-1 service.[46] Allnet subsequently filed an application for review of the Bureau's discovery order on other grounds but did not challenge the Bureau's ruling regarding the relevance of Allnet's request for correspondence between Ameritech and its equipment suppliers. In any event, although the issue of switching capability was not squarely before at the time we issued the *Damages Orders*, Allnet has presented no plausible rationale for its claim that the Commission could not consider technical matters within its own expertise in ruling on Allnet's Section 202(a) discrimination claims.

V. CONCLUSION AND ORDERING CLAUSES

17. We have carefully reviewed the record before us and have found, to the extent indicated herein, that Allnet is entitled to an upward adjustment of its damages award from USWC for MTN's violations of our rate of return prescription for the 1985-1986 monitoring period. We have also concluded that Allnet is not entitled to additional adjustments to its award of damages from USWC's former operating companies. Finally, we have found that Allnet has not presented any evidence or arguments that persuade us to alter our rulings regarding its intraLATA, interstate dial-1 presubscription claims.

18. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 206-209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C.§§ 154(i), 201, 202, 206-209, and 405, that the Petitions for Reconsideration filed by Allnet Communication Services, Inc. on June 3, 1993 ARE GRANTED to the extent indicated above and otherwise, ARE DENIED.

19. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company SHALL PAY to Allnet Communication Services, Inc. additional damages in the amount of $36,757 (Thirty-six thousand seven hundred fifty-seven dollars) within 60 days after the release date of this Memorandum Opinion and Order.

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[38] Allnet/Ameritech Reply at 4.

[39] *Id.* at 6, referring to Ameritech Opposition at 15.

[40] *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3026.

[41] Allnet also raises arguments that were previously considered at length and rejected by the Commission. *See USWC Damages Order*, 8 FCC Rcd at 3024-3026; *Ameritech Damages Order*, 8 FCC Rcd at 3042-3043.

[42] *See Damages Order*, 8 FCC Rcd at 3026.

[43] Even so, Allnet appears to acknowledge that requiring dual presubscription for intraLATA, interstate calling would entail changes, with attendant costs, in existing presubscription procedures. *See* Allnet Petition at 12. It contends nevertheless that whatever the costs, carriers would be willing to absorb them and educate consumers free of charge. *Id.*

[44] *See USWC Damages Order*, 8 FCC Rcd at 3026. We emphasis again that our determination that the defendants have not engaged in unlawful discrimination should not be construed as prejudging the issues and arguments presented in CC Docket No. 92-237 regarding the need for and feasibility of dial-1 intraLATA, interstate access. *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3026, n.91. In addressing the issue, we intend to give full consideration to the information and arguments presented in that docketed proceeding.

[45] *See* Allnet's First Set of Interrogatories, filed April 1, 1991.

[46] Allnet Communications Services, Inc. v. Illinois Bell, et al., 7 FCC Rcd 4885, 4888 (Com. Car. Bur. 1991).

20. IT IS FURTHER ORDERED that Mountain States Telephone and Telegraph Company SHALL PAY to Allnet Communication Services, Inc. interest, compounded daily, on the damages specified here computed at the IRS rates set forth in Appendix A of the *USWC Damages Order*.

21. IT IS FURTHER ORDERED that the Motions to Accept Late-Filed Oppositions filed by the Ameritech Operating Companies on June 25, 1993 ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-89-297

MCI TELECOMMUNICATIONS CORPORATION
Defendant.

ORDER

Adopted: February 16, 1994; Released: February 23, 1994

By the Acting Chief, Enforcement Division, Common Carrier Bureau:

1. On May 3, 1993, the Commission issued a Memorandum Opinion and Order in the above-captioned proceeding, finding that MCI Telecommunications Corporation (MCI) violated Section 203 of the Communications Act of 1934 as amended,[1] in connection with its failure to file tariffs for services it provided to several customers.[2] The Commission declined, at that time, however, to consider the complainant, AT&T Communications' (AT&T's) claim for monetary damages and its request for imposition of forfeitures against MCI. Instead, the Commission established a pleading cycle for further proceedings on a petition filed by MCI which seeks a declaratory ruling that MCI and other nondominant carriers will not be liable for damages because their failure to file tariffs was consistent with the Commission's forbearance policy.[3]

2. On September 9, 1993, AT&T filed a request to withdraw its claim for damages and its request for the imposition of forfeitures against MCI. This request is unopposed by MCI although it contends that the Commission should rule on its related petition for declaratory ruling.[4]

3. We are satisfied that granting AT&T's request will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission. We do not, however, dismiss MCI's petition which raises issues that transcend AT&T's damages claim. Instead, we will sever MCI's petition and establish a separate proceeding for it.

4. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that AT&T's request to withdraw its damages claims and its request for the imposition of forfeitures IS GRANTED and such claims and requests for relief ARE DISMISSED WITH PREJUDICE.

5. IT IS FURTHER ORDERED that MCI's Petition for Declaratory Ruling and all related pleadings ARE SEVERED from this complaint proceeding and ARE INCORPORATED into File No. ENF-94-02.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief, Enforcement Division
Common Carrier Bureau

[1] 47 U.S.C. § 203.

[2] AT&T Communications v. MCI Telecommunications Corp., 8 FCC Rcd 3202 (1993), citing *AT&T Communications v. F.C.C.*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993). A full account of this proceeding's history is provided therein. MCI filed a petition for reconsideration of the Commission's decision on June 1, 1993 and that petition is pending.

[3] *See* MCI Petition for Declaratory Ruling, filed March 8, 1993.

[4] *See* Letter from Donald J. Elardo to Gregory A. Weiss, dated September 22, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of

Expanded Transport Phase I
Interconnection with
Local Telephone Company Facilities

Pacific Bell Request for Waiver
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 1994; Released: February 9, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 2, 1993, the Commission released the *Switched Transport Expanded Interconnection Order,* which required most Tier 1 local exchange carriers (LECs) to file tariffs for the provision of expanded interconnection for interstate switched transport service.[1] In that Order, the Commission required interconnectors to provide percent interstate usage (PIU) reports to LECs to determine to what extent interstate and intrastate access charges are applicable.[2] On November 18, 1993, Pacific Bell and Nevada Bell (together, Pacific) filed a petition for waiver of the PIU reporting requirement until July 1, 1994. No oppositions were filed in response to Pacific's petition.

2. Pacific claims that its Carrier Access Billing System (CABS) does not currently have the capability of charging for Feature Group D traffic based on customer-reported PIU factors.[3] In the past, Pacific has relied on a derived PIU factor it calculates from originating traffic.[4] Pacific claims that making this modification to CABS will take approximately five months.[5] Pacific also argues that it cannot start making this modification until January 7, 1994, when it expects to finish reprogramming CABS for switched transport expanded interconnection, 800 database service, and host/remote measurement required by the Commission's *Transport* proceeding.[6] Pacific estimates that it will take about eight weeks to identify and document its requirements, three weeks to design its system, five weeks to code and test changes, and four weeks to test the system.[7] Pacific seeks waiver of the PIU requirement until July 1, 1994.[8]

3. Rules may be waived if there is "good cause" to do so.[9] The Commission may exercise its discretion to waive a rule whenever particular facts would make strict compliance inconsistent with the public interest.[10] Pacific has shown that the necessary reprogramming of the CABS billing system is a labor-intensive process, and its estimate of approximately six months to complete revising its billing system appears to be reasonable. Furthermore, Pacific appears to be unique in not relying on customer-reported PIU factors in the past. Finally, no party has opposed Pacific's waiver request. Therefore, we conclude that Pacific Bell has shown good cause for a limited waiver of the PIU reporting requirement until July 1, 1994.

4. IT IS FURTHER ORDERED that the petition for waiver filed by Pacific Bell and Nevada Bell IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

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[1] Expanded Interconnection with Local Telephone Company Facilities, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141 Transport Phase I, 8 FCC Rcd 7374 (1993) (*Switched Transport Expanded Interconnection Order).*

[2] *Id.* at 7442-43 (para. 137).

[3] Pacific Petition at 1-2.

[4] *Id.* at 3.

[5] *Id.* at 3-4 and Exh. A.

[6] *Id.* at 2-3. Pacific also states that some CABS revisions will be required to accommodate intrastate cellular service changes. Because it does not describe what these cellular service changes are, we do not base our decision on this assertion.

[7] *Id.* at 3.

[8] *Id.* at 4.

[9] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[10] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Roberts Cellular, Inc. File No. 54792-CL-P-199-A-86

For facilities in the Domestic
Public Cellular Radio
Telecommunications Service
on frequency Block A in
Market 199, Steubenville -
Weirton, Ohio-West Virginia
Metropolitan Statistical Area

ERRATUM

Released: February 16, 1994

By the Chief, Mobile Services Division:

1. The *Memorandum Opinion and Order* in the above-captioned proceeding, DA 94-44 (released Jan.18, 1994), is corrected to add paragraph 34 under the heading "IV. ORDERING CLAUSE" to read as follows:

34. Accordingly, IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Roberts Cellular, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-62

In the Matter of

Guidelines for Evaluating the
Environmental Effects of
Radiofrequency Radiation

ORDER EXTENDING TIME FOR COMMENTS AND REPLY COMMENTS

Adopted: November 8, 1993; Released: November 9, 1993

Comment Date: January 11, 1994
Reply Comment Date: February 10, 1994

By the Chief, Office of Engineering and Technology

1. On November 2, 1993, CBS Inc. ("CBS") and Capital Cities/ABC Inc. ("Capital Cities"), licensees of AM, FM and television broadcast stations, filed with the Commission a "Request for Extension of Time" in the above-named proceeding. CBS and Capital Cities requested that the Commission extend, by a period of sixty (60) days, the time for filing comments and reply comments. A similar request was filed by Hammett and Edison, Inc., a broadcast consulting firm, on November 2, 1993.

2. The deadline originally established for filing comments was August 13, 1993, and the date for reply comments was September 13, 1993. Previously, on August 3, 1993, the Commission granted a request filed by the National Association of Broadcasters (NAB) for an extension of time of ninety (90) days for filing comments and reply comments.[1] This action established a new deadline for filing comments of November 12, 1993, and a new deadline for reply comments of December 13, 1993.

3. The previous extension was granted to allow NAB time to complete a study commissioned to develop non-measurement based techniques for determining compliance with new guidelines for human exposure to radiofrequency (RF) fields proposed for adoption by the Commission.[2] The Commission has proposed to incorporate into its rules the newly revised standard of the American National Standards Institute (ANSI) developed by the Institute of Electrical and Electronics Engineers (IEEE) and designated IEEE C95.1-1991 (also ANSI/IEEE C95.1-1992).[3] CBS and Capital Cities have requested the latest extension in order to complete their analysis of recent data and information, including results from the NAB study and experimental results from the laboratory of Dr. Om P. Gandhi, that have become available relative to broadcaster compliance with the new guidelines.

4. CBS, Capital Cities, and Hammett and Edison note that the new information with respect to the consequences of the proposed guidelines has only recently become available. CBS and Capital Cities state that preliminary assessment of this information suggests that adoption of the guidelines, especially those that relate to induced RF currents, may significantly impact broadcasters. Hammett and Edison also have indicated that the new data is likely to affect implementation requirements for broadcasters. CBS and Capital Cities maintain that additional time is necessary to consider the implications of the new data, both to determine whether further study is required and to assess the effect that the proposed guidelines will have on broadcast operations.

5. CBS and Capital Cities believe that additional time is required to allow broadcasters to conduct field measurements to evaluate the new theoretical and experimental results. They also point out that the equipment necessary to make such measurements has not been readily available commercially, further justifying the need for additional time.

6. The Commission does not routinely grant requests for extensions of time.[4] However, we recognize the complexity of the issues raised by the new exposure guidelines and the difficulties in developing reasonable methods by which compliance can be evaluated. In this regard, it is clear to us that there is a need for additional data and analysis, particularly with respect to the new guidelines for induced and contact currents. If by granting this request for an extension meaningful insights can be gained into these issues, it appears that such an extension will benefit all concerned parties.

7. An extension could delay somewhat the implementation schedule for new guidelines. However, by providing further opportunity to acquire information needed for accurate and reasonable procedures and methods, an extension may actually facilitate the process of guideline implementation. It appears that there is adequate justification to support these requests, and we believe that the public interest will best be served by an extension.

8. Accordingly, IT IS ORDERED THAT the deadline for filing comments IS EXTENDED to January 11, 1994, and the deadline for filing reply comments IS EXTENDED to February 10, 1994. This action is taken pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241 and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241 and 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

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[1] *See Order Extending Time for Comments and Reply Comments*, ET Docket 93-62, 8 FCC Rcd 5528 (1993).
[2] *See Notice of Proposed Rule Making* in ET Docket 93-62, 8 FCC Rcd 2849 (1993).
[3] *Id.*, Note 2 at paragraph 1.
[4] 47 C.F.R. Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WALTER O CHESKEY, Trustee-in-Bankruptcy for N.C.P.T. Cellular, Inc. (Assignor) — File No. 03992-CL-AL-1-93

and

TRIAD CELLULAR L.P. (Assignee)

For Consent to the Assignment of a license in the Domestic Public Cellular Radio Telecommunications Service Station KNKN334, Market 652A Texas 1 - Dallam RSA

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1994; Released: February 24, 1994

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Walter O Cheskey, Trustee-in-Bankruptcy for N.C.P.T. Cellular, Inc. (Trustee), and Triad Cellular L.P. (Triad) are seeking consent to the assignment of the license of Station KNKN334 serving Market 652A, Texas 1 - Dallam (Texas 1 RSA). A petition to deny was filed by Amarillo CellTelCo (Amarillo). For the reasons set forth below, we deny Amarillo's Petition and grant the above-captioned assignment application.

II. BACKGROUND

2. The Trustee has been designated by the United States Bankruptcy Court for the Northern District of Texas (the Bankruptcy Court) as the court-appointed successor to the prior licensee of the Texas 1 Block A system,[1] with the consent of the Commission. The Bankruptcy Court has entered an order approving the sale of the system to Triad.

3. Amarillo, a disappointed bidder in the bankruptcy proceeding, is seeking to deny the assignment on the grounds that: (a) the Trustee lacked the authority to sign the FCC Form 490 on May 21, 1993 because the order of the Bankruptcy Court approving the sale was not officially entered until four days later; (b) the Trustee and the Bankruptcy Court improperly rejected Amarillo's efforts to buy the system; (c) the assignment application seeks to enforce an impermissible security interest in the license, and (d) Triad has failed to show financial ability to operate the system.

III. DISCUSSION

4. In response to Amarillo's accusation that it prematurely filed the assignment application, the Trustee amended the pending application to include a new signature page executed after the date of entry of the written Bankruptcy order approving the sale.[2] Moreover, Amarillo does not contest that the Bankruptcy order approving the Trustee's sale to Triad has now been entered and has not been stayed. Consequently, the signature issue is moot.

5. Amarillo's claims that the actions of the Trustee or the Bankruptcy Court in rejecting Amarillo's efforts to buy the system are proper under bankruptcy law are pending on appeal before a court of competent jurisdiction and will not be relitigated here. *See, e.g., Leon P. Gorman, Jr.*, 39 FCC 2d 37 (1973). Further, it is well settled that the Commission will not defer action on transfer and assignment applications simply because proceedings are pending before the courts regarding a proposed transaction. *Pinelands, Inc.*, 7 FCC Rcd 6058, 6060-61 & n.9 (1992).[3]

6. Amarillo has failed to make a *prima facie* case that the proposed sale to Triad constitutes the enforcement of an impermissible security interest in a radio license. In the bankruptcy proceeding, the Trustee proposed a settlement to the court to resolve the controversy between the bankrupt estate and the primary creditor, Motorola. The court signed an order[4] (Compromise of Controversy), which obligated the purchaser of estate assets, Triad, to make certain commitments to Motorola in settlement of the case. The language memorialized in the court's order is what Amarillo cites as support for its claim that Triad is unqualified as a purchaser. Despite Amarillo's claim, in the Compromise of Controversy the court stated that Motorola now has *no* security interest in the Texas 1 - Dallam RSA.[5]

7. Amarillo also claims that in the Compromise of Controversy, Triad participated in giving Motorola a security interest in the proceeds of the sale of a license.[6] Amarillo argues that Triad's actions should disqualify it as a trans-

[1] N.C.P.T. Cellular, Inc. held the license prior to the bankruptcy proceeding. The Commission granted an application for a pro forma transfer of control of the license from N.C.P.T. to the Trustee, File No. 01852-CL-AL-1-93, Public Notice, report no. CL-93-57, released February 26, 1993.

[2] The Bankruptcy court approved the sale in a ruling from the bench on April 2, 1993: "The rulings are as follows: The sale and settlement agreement are approved in tandem." Walter O Cheskey and Triad Cellular, L.P., Joint Opposition to Petition to Deny, Attachment D, Reporter's Transcript of Proceedings from April 2, 1993, at 262, filed August 16, 1993.

[3] The non-deferral policy is particularly apt in financial distress situations where the public interest will be served by getting the license into the hands of a qualified operator.

[4] Order Approving Compromise of Controversy, Bankruptcy Court for the Northern District of Texas, May 25, 1993.

[5] Order Approving Compromise of Controversy, Section IV, Bankruptcy Court for the Northern District of Texas, May 25, 1993.

[6] The pertinent sections of the "Compromise of Controversy" approved by the Bankruptcy Court on May 25, 1993 are set forth below:

feree-applicant. We reject this argument. A security interest in the proceeds of the sale of a license does not violate Commission policy.

8. The Commission has a policy against a licensee giving a security interest in a license. *In re Kirk Merkley,* 94 FCC 2d 829 (1983). The reason for the policy is that the Commission's statutory mandate requires it to approve the qualifications of every applicant for a license. 47 U.S.C. § 310(d). If a security interest holder were to foreclose on the collateral license, by operation of law, the license could transfer hands without the prior approval of the Commission.

9. In contrast, giving a security interest in the proceeds of the sale of a license does not raise the same concerns. When a licensee gives a security interest in the proceeds of the sale of the system, including the license, the licensee's creditor has rights with respect to the money or other assets the licensee receives in exchange for the system and license. The creditor has no rights over the license itself, nor can it take any action under its security interest until there has been a transfer which yields proceeds subject to the security interest. Thus, when the creditor exercises his security interest, the licensee will no longer be holding the license. *Accord In re Ridgely,* 139 B.R. 374 (Bkrtcy.D. Md. 1992).[7] *Contra Tak Communications,* 985 F.2d 916 (7th Cir. 1993).[8] Therefore, we deny Amarillo's petition.

10. Amarillo challenges Triad's financial showing only because Amarillo claims that Triad must construct the Texas 1 cellular system. According to Amarillo, Triad will have to build or acquire a switch to make the system operational which would be very costly. However, Triad responds that a stand-alone switch in Texas 1 is not necessary as Triad has already made arrangements to tie the Texas 1 system into Triad's existing switch located in the Texas 2 market. This system was constructed and operating as of April 8, 1991 when NCPT Cellular, predecessor to the Trustee, filed an FCC Form 489, file no. 09304-CL-L-91, to indicate that it commenced service in the market. Thus, a showing of construction and first year operating expenses by the assignee is not required. Triad's assignment application provides adequate financial information to satisfy us that it is qualified to be assigned this license. *See Robert L. Kile,* 5 FCC Rcd 513, 514 (1990); *CNCA Acquisition Corp.,* 3 FCC Rcd 6088, 6096 n.8 (1988); *Centel Corp.,* 8 FCC Rcd 1829, 1831 (Com. Car Bur. 1993).

11. We note that Triad and the Trustee filed an additional letter which resulted in the filing of more pleadings by Amarillo. The Trustee's counsel's letter of Sept. 22, 1993[9] responded in part to questions raised by the Commission at a meeting on Sept. 8, 1993. Counsel for Amarillo filed a counter-letter in protest,[10] and the Trustee withdrew portions of its letter.[11] However, Amarillo filed a motion to file an additional pleading and an opposition to the letter, which had in large part already been withdrawn. Section 22.13(c)(2) of the Commission's Rules, 47 C.F.R. § 22.13(c)(2), allows staff to request and accept additional information. The information that staff requested of the Trustee was set forth in the September 22, 1993 letter. In the interests of fairness, we will accept Amarillo's initial

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V.

The Trustee has agreed to release any and all claims the estate may have against Motorola on any cause of action asserted against that creditor. The Trustee hereby stipulates to the validity of Motorola's Proof of Claim currently on file, except as to accounting and mathematical errors. The Trustee specifically reserves the right to review the calculations of Motorola and its Proof of Claim.

Motorola would be granted a secured claim in the amount of $1,600,000.00, with the balance of their claim to be stipulated as an unsecured claim. The $1,600,000.00 will be paid to Motorola upon closing of the sale of Estate assets to Triad Cellular Limited Partnership. Motorola further agrees to assist the Debtor in an orderly transition as to the technical aspects of the business when the sale is consummated to Triad Cellular Limited Partnership.

This agreement resolved in full all disputes and causes of action which the bankruptcy estate, all creditors or parties in interest of the bankruptcy estate have or might otherwise assert as to the claim of Motorola in this proceeding, and/or the security interest held by Motorola in assets of the bankruptcy estate, (sic) including but not limited to, the FCC Texas One RSA Cellular Phone System license held by the Trustee for the benefit of the estate.

VI.

Without admission by any party and solely for purposes of settlement and to buy peace, the parties agree that for purposes of the distributions in the above bankruptcy proceeding, and this proceeding alone, Motorola will not seek to enforce or recover on any security interest, or other contractual right, or alleged contractual right, which Motorola might otherwise have or assert in the FCC Texas - RSA Cellular Phone System License held by the Bankruptcy Estate. In consideration for this Agreement, the Estate agrees that Motorola has a valid and enforceable, perfected first lien security interest in all other assets of the Bankruptcy Estate covered by its financing agreement with National Cellular Partners, now the Debtor, dated October 22,1990.

[7] In *Ridgely,* the court upheld a security interest in the proceeds of the sale of a license, explaining "that a creditor may perfect a security interest in a debtor's F.C.C. broadcasting license, limited to the extent of the licensee's proprietary rights in the license vis-a-vis private third parties. The right of the licensee crucial to this decision (and the only right recognized by the Court in this case) is the right of the creditor to claim proceeds received by the debtor licensee from a private buyer in exchange for the transfer of the license to that buyer." *Id.* at 379.

[8] The Court in *Tak* held that the Commission has a policy prohibiting a licensee from giving a security interest to a creditor in the proceeds of the sale of a license. It expressly declined to adopt the rationale of *Ridgely,* 139 B.R. 374. We respectfully conclude that the court erred in *Tak.* Moreover, we were not a party to that action. The court's ruling cannot bind the Commission to a policy which it does not have.

[9] Letter from Carl W. Northrop, counsel to Walter O Cheskey, to John Cimko, Chief, Mobile Services Division, September 22, 1993.

[10] Letter from Eliot Greenwald, counsel to Amarillo CellTelCo, to John Cimko, Chief, Mobile Services Division, September 28, 1993.

[11] Letter from Carl W. Northrop, counsel to Walter O Cheskey, to John Cimko, Chief, Mobile Services Division, October 5, 1993.

response to that letter. All other subsequently filed pleadings, such as Amarillo's motion and opposition, are rejected under section 1.45(c) of the Rules because no new pleadings were requested. 47 C.F.R. § 1.45(c); *Cf.* 47 C.F.R. § 22.30(a)(2). Moreover, after portions of the letter had been withdrawn, there was no need to file additional pleadings. The final opposition is rejected, and the letter is considered withdrawn, except to the extent that it indicated the Trustee's response to dismissing an earlier application.

12. For the reasons set forth above, we deny the petition and grant the assignment application because we find the application to be technically, financially and otherwise qualified, and grant of the assignment application will be in the public interest.

IV. ORDERING PARAGRAPHS

13. Accordingly, IT IS HEREBY ORDERED THAT the petition to deny filed by Amarillo CellTelCo against the assignment of license application, File No. 03992-CL-AL-1-93, IS DENIED.

14. IT IS FURTHER ORDERED THAT the application of Walter O Cheskey, Trustee-in-Bankruptcy for N.C.P.T. Cellular, Inc. (Assignor) and Triad Cellular L.P. (Assignee) for consent to the assignment of license of Station KNKN334, File No. 03992-CL-AL-1-93, IS GRANTED.

15. IT IS FURTHER ORDERED THAT Amarillo CellTelCo's Motion for Leave to File a Responsive Pleading IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-62

In the Matter of

Guidelines for Evaluating the
Environmental Effects of
Radiofrequency Radiation

ORDER EXTENDING TIME FOR REPLY COMMENTS

Adopted: February 17, 1994; Released: February 18, 1994

Reply Comment Date: April 25, 1994

By the Chief, Office of Engineering and Technology

1. On February 15, 1994, the Mobile Communications Division of the Telecommunications Industry Association ("TIA") filed with the Commission a "Motion for Extension of Time" in the above-named proceeding. TIA has requested that the Commission extend, by a period of 60 days, the time for filing reply comments.

2. The Commission has proposed to incorporate into its rules the revised standard of the American National Standards Institute (ANSI) developed by the Institute of Electrical and Electronics Engineers (IEEE) and designated IEEE C95.1-1991 (also ANSI/IEEE C95.1-1992) for human exposure to radiofrequency (RF) fields.[1] The deadline originally established for filing comments in this proceeding was August 13, 1993, and the date for reply comments was September 13, 1993.

3. Previously, on August 3, 1993, the Commission granted a request filed by the National Association of Broadcasters (NAB) for an extension of time of ninety (90) days for filing comments and reply comments.[2] This action established a new deadline for filing comments of November 12, 1993, and a new deadline for filing reply comments of December 13, 1993.

4. Subsequently, on November 2, 1993, CBS, Inc., ("CBS") and Capital Cities/ABC, Inc., filed a request to extend the comment and reply comment deadlines an additional sixty (60) days. The Commission approved this request changing the deadlines for filing comments and reply comments to January 11, 1994, and February 10, 1994, respectively.[3] On January 3, 1994, CBS filed a request for an additional 14 day extension. This was also approved resulting in new dates of January 25, 1994, and February 24, 1994, for comments and reply comments.[4]

5. The first extension was granted to allow NAB time to complete a study commissioned to develop non-measurement based techniques for determining compliance with new guidelines. The second extension was granted in response to filings by CBS, Capital Cities, and Hammett and Edison, Inc., noting that new information from the NAB study and other experimental results relevant to the consequences of the proposed guidelines had only recently become available. CBS and Capital Cities maintained that additional time was necessary to consider the implications of the new data, both to determine whether further study was required and to assess the effect that the proposed guidelines will have on broadcast operations.

6. The most recent extension was granted to allow CBS an additional 14 days to perform measurements and to organize and analyze data that is relevant in considering implementation of new guidelines on RF induced currents. CBS also requested additional time to facilitate the filing of a single set of comments representing the views of itself and several other broadcast entities.

7. The TIA represents manufacturers and suppliers of telecommunications equipment used primarily in the cellular, private land-mobile radio, cordless radio and personal communications services. In the latest request for an extension TIA points out that there have been over 1200 pages of comments filed with the Commission to date in this proceeding over the approximately nine-month period that was ultimately allowed for comments. Therefore, TIA maintains that it would not be equitable to allow only a thirty-day period in which to evaluate and respond to these comments, especially in view of the complex nature of the issues involved.

8. The Commission does not routinely grant requests for extensions of time.[5] However, we continue to recognize the complexity of the issues raised by the new exposure guidelines and the difficulties in developing reasonable methods by which compliance can be evaluated. We also agree that the many comments filed in this docket to date require a more reasonable amount of time for review and response. Therefore, the request by TIA for a further extension is justified.

9. Accordingly, IT IS ORDERED THAT the deadline for filing reply comments IS EXTENDED to April 25, 1994. This action is taken pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241 and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241 and 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

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[1] See *Notice of Proposed Rule Making* in ET Docket 93-62, 8 FCC Rcd 2849 (1993).

[2] *See Order Extending Time for Comments and Reply Comments*, ET Docket 93-62, 8 FCC Rcd 5528 (1993).

[3] *See Order Extending Comments and Reply Comments*, ET Docket 93-62, 58 Fed. Reg. 60827 (November 18, 1993).

[4] *See Order Extending Time for Comments and Reply Comments*, ET Docket 93-62, 59 Fed. Reg. 3050 (January 20, 1994).

[5] 47 C.F.R. Section 1.46 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 24, 1994

PUERTO RICO COMMUNICATIONS CORPORATION FILES ITS INITIAL COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On January 31, 1994, Puerto Rico Communications Corporation (PRCC) filed its initial cost allocation manual (CAM) for the separation of regulated and nonregulated costs. Parties may file comments on PRCC's CAM no later than **March 24, 1994.** Replies should be filed by **April 8, 1994.** Comments should reference AAD 94-25. A copy of each pleading should be sent to Tom Petras, FCC, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554. A copy should also be sent to the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Tom Petras at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

International Exchange Networks, Ltd. — File No. I-T-C-93-319

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish and Operate International Private Line and Switched Resale Services

ORDER AND CERTIFICATION

Adopted: February 10, 1994; Released: February 25, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of switched services and of international private lines for the provision of non-interconnected international private line services to the general public by International Exchange Networks, Ltd. ("iXnet").

2. Accordingly, IT IS ORDERED that application File I-T-C-93-319 IS GRANTED and iXnet is authorized to resell, pursuant to the tariffs of authorized international common carriers,[1] switched services and international private lines not interconnected to the public switched network for the provision of international private line services[2] between the United States and each of the sixteen (16) international points,[3] as specified in Appendix A.

3. IT IS FURTHER ORDERED that iXnet is authorized to lease and operate one-half interest in up to 96 E-1 circuits for the provision of its authorized resale of international private lines for non-interconnected private line services, as specified in Appendix A.

4. IT IS FURTHER ORDERED that neither iXnet nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which iXnet or any such persons or companies controlling or controlled by iXnet are parties.

5. IT IS FURTHER ORDERED that our authorization of iXnet to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service between the United States and each of 16 international points, as specified in Appendix A -- that is, private lines which carry traffic that originates in the United States and terminates in one of the 16 international points, or originates in one of the 16 international points and terminates in the United States. In addition, iXnet may not -- and iXnet's tariffs must state that iXnet's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Third Further Notice*), 7 FCC Rcd 7927 (1992),

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[1] The applicant proposes to resell the private lines and switched services of one or more of the following carriers pursuant to their applicable tariffs: AT&T Tariff FCC Nos. 1,2,4,9,11 and 12; MCI International Tariff FCC No. 1; MCI/OTI Tariff FCC No. 3; MCI/WUI Tariff FCC No. 27; Sprint Tariff FCC Nos. 1,2,5, and 7; Worldcom Tariff FCC No. 1; TRT-FTC Tariff FGC No. 14; TRT International Tariff FCC No. 1; and FTC Tariff FCC Nos. 17 and 23.

[2] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, (*Phase II First Report and Order*), 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates*, CC Docket 90-337, *Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Phase II Third Further Notice*), 7 FCC Rcd 7927 (1992).)

[3] *See* Appendix A for list of authorized international points. We note that should iXnet obtain any interest in facilities beyond the authorized sixteen international points for the purpose of providing common carrier services, including private line service, between the U.S. and other international points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for iXnet to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

fONOROLA Corporation and EMI Communications Corporation (fONOROLA/EMI Order), 7 FCC Rcd 7312 (1992), *petition for reconsideration pending.*

6. IT IS FURTHER ORDERED that iXnet shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that iXnet shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that iXnet shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services iXnet seeks authority to provide. The transmission of money is not considered to be a common carrier service.

11. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Appendix A

Country	E-1 Circuits
Australia	2
Brazil	4
Canada	10
Denmark	2
France	4
Germany	4
Hong Kong	2
Italy	4
Japan	14
Korea	2
the Netherlands	12
Singapore	2
Sweden	2
Switzerland	10
Taiwan	2
United Kingdom	20

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC Global Corp. File No. I-T-C-93-034

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to operate as an international private line resale carrier.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: February 10, 1994; Released: February 25, 1994

By the Chief, International Facilities Division:

1. The above-captioned application filed by ACC Global Corp. (ACC) requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell (i) international switched services between the United States and various international points, (ii) international private lines for the provision of international private line services not interconnected to the public switched network (PSN) between the United States and the seventeen (17) international points specified in Appendix A, and (iii) international private lines to provide switched services between the United States and Canada only.[1]

2. The application was placed on public notice on November 25, 1992. Subsequently, American Telephone & Telegraph Company (AT&T) filed a petition to deny ACC's request to resell international private lines for the provision of switched services between the United States and Canada. ACC then filed an opposition to which AT&T replied.

3. AT&T opposes the grant of ACC's application for international private line resale to Canada unless the Commission conditions the authorization with certain reporting and tracking requirements.[2] Specifically, AT&T asserts that the Commission should require resellers of international private lines for the provision of switched services between the United States and Canada to (a) file monthly reports of the billed minutes provided via the interconnected private lines, separately by service category, for northbound and southbound traffic; (b) place those reports on public notice for full review; and (c) monitor the private line resale traffic and, on its own initiative, suspend private line resale pending further investigation if the traffic data demonstrates any resulting increase to the net settlements burden of U.S. customers during any consecutive three month period. AT&T has raised these same issues in its petition for reconsideration of the *fONOROLA/EMI Order*, *supra* at n.2. We defer consideration of these issues to AT&T's pending petition, and, thus, find that the present and future public convenience and necessity require the grant of this authorization subject to possible modification or revocation based on the outcome of that petition.

4. Accordingly, IT IS ORDERED that application File I-T-C-93-034 IS GRANTED and ACC is authorized to resell international switched services between the United States and the various international points pursuant to the tariffs of the authorized U.S. international common carriers specified.[3]

5. IT IS FURTHER ORDERED that ACC is authorized to lease and operate a one-half interest in up to twenty DS-1 circuits for the provision of switched services between

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[1] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not result in the unilateral diversion of U.S. inbound switched traffic to private lines, and thus, exacerbate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. (*See Regulation of International Accounting Rates*, CC Docket 90-337, *Phase II, First Report and Order*, 7 FCC Rcd 559 (1992)). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nonetheless, the Commission confirmed the right of an end user to interconnect its international private line to the PSN through, for example, its own PBX. (*See Regulation of International Accounting Rates*, CC Docket 90-337, *Phase II, Order on Reconsideration and Third Further Notice of Proposed Rulemaking* (*Phase II Third Further Notice*), 7 FCC Rcd 7927 (1992)).

[2] The Commission first addressed the issue of Canadian equivalency in the *fONOROLA Corporation and EMI Communications Corporation Order* (*fONOROLA/EMI Order*). In that Order, the Commission found that Canada affords resale opportunities equivalent to those available under U.S. law. As a result, resale of international private lines for switched services and of interconnected international private lines for private line services between the United States and Canada is permitted subject to appropriate Section 214 authorization. *See fONOROLA/EMI Order*, 7 FCC Rcd 7312 (1992), *petition for reconsideration pending*.

[3] ACC proposes to resell the private lines and the switched services of one or more of the following carriers pursuant to their applicable tariffs: AT&T Tariffs FCC Nos. 1, 2, 9, 11 & 12; ATC Long Distance Tariff FCC No. 2; Cable & Wireless Communications, Inc. Tariff FCC No. 3; EMI Communications Corporation, Tariff FCC No. 14; fONOROLA Corporation Tariff FCC No. 1; LDDS Communications, Inc. Tariff FCC No. 1; Litel Telecommunications, Inc. Tariff FCC No. 1; MCI International Telecommunications Corporation Tariffs FCC Nos. 1 & 2; MCI/Overseas Telecommunications, Inc. Tariffs FCC Nos. 1 & 2; MCI/Western Union Tariffs FCC Nos. 20 & 27; MidAtlantic Telecommunications, Inc. Tariff FCC No. 1; US Sprint Communications Tariffs FCC Nos. 1, 2, 5 & 7; TRT/FTC Communications, Inc. Tariff FCC No. 15; U.S. Long Distance, Inc. Tariff FCC No. 1; and WilTel, Inc. Tariff FCC No. 2.

the United States and Canada only, pursuant to the tariffs of authorized U.S. international common carriers, as specified in note 3.

6. IT IS FURTHER ORDERED that ACC is authorized to lease and operate a one-half interest in up to 340 DS-1 circuits, as specified in Appendix A, for the provision of non-interconnected private line services between the United States and each of the international points listed in Appendix A, pursuant to the tariffs of authorized U.S. international common carriers.[4]

7. IT IS FURTHER ORDERED that our authorization of ACC to resell international private lines for the provision of non-interconnected private line service is limited to the provision of such private line service only between the United States and each of the international points listed in Appendix A -- that is, private lines which carry traffic that originates in the United States and terminates in one of the international points in Appendix A, or originates in any of the international points listed in Appendix A and terminates in the United States. In addition, ACC may not -- and ACC's tariffs must state that ACC's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*; Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking (Third Further Notice)*, 7 FCC Rcd 7927 (1992), *fONOROLA/EMI Order*, 7 FCC Rcd 7312 (1992), *petition for reconsideration pending*.

8. IT IS FURTHER ORDERED that neither ACC nor any person or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possession which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which ACC or any such persons or companies controlling or controlled by ACC are parties.

9. IT IS FURTHER ORDERED that ACC shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

10. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines for the provision of switched services between the United States and Canada is limited to the provision of such services between the United States and Canada only -- that is, private lines which carry traffic that originates in the United States and terminates in Canada, or traffic that originates in Canada and terminates in the United States.

11. IT IS FURTHER ORDERED that ACC shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

12. IT IS FURTHER ORDERED that ACC shall file semi-annual reports of circuit additions, pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

13. IT IS FURTHER ORDERED that ACC shall file with the Commission a copy any operating agreement it enters into with its foreign correspondents within thirty (30) days of execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

14. IT IS FURTHER ORDERED that ACC shall file all arrangements for the interconnection of private lines to the U.S. public switched network, pursuant to Section 43.51(a) of our Rules, 47 C.F.R. §43.51(a).

15. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *fONOROLA/EMI Order (pet. for recon. pending)*, the *Phase II Third Further Notice*, and any related proceedings.

16. IT IS FURTHER ORDERED that grant of this authorization to resell international private lines for the provision of switched services to Canada is conditioned upon Canada's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

17. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services ACC seeks authority to provide. The transmission of money is not considered to be a common carrier service.

18. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[4] *See supra* note 3.

APPENDIX A

Country	DS-1 Circuits
Australia	20
Belgium	20
Canada	20
Denmark	20
Finland	20
France	20
Germany	20
Greece	20
Ireland	20
Italy	20
The Netherlands	20
Norway	20
Portugal	20
Spain	20
Sweden	20
Switzerland	20
United Kingdom	20

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PSO, Inc. File No. ITC-94-065

For Authority, Pursuant to
Section 214 of the Communications
Act of 1934, As Amended, to Resell
Private Line Service from Points
Located in the United States to
El Salvador

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 10, 1994; Released: February 25, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the resale of international private lines for the provision of international private line services to the general public by PSO, Inc. ("PSO").[1]

2. Accordingly, IT IS ORDERED that application file I-T-C-94-065 IS GRANTED and PSO is authorized to resell international private lines not interconnected to the public switched network for the provision of international private line video-teleconferencing communications service[2] between the United States and El Salvador.[3]

3. IT IS FURTHER ORDERED that PSO is authorized to lease and operate a one-half interest in one (1) 128 kpbs circuit line from AT&T Communications Corp., at tariff, for the provision of its authorized resale of international private lines for private line services, not to be interconnected with the public switch network, as specified in this Order.

4. IT IS FURTHER ORDERED that neither PSO nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession contract, understanding, or working arrangement to which PSO or any such persons or companies controlling or controlled by PSO are parties.

5. IT IS FURTHER ORDERED that PSO shall file publicly tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized herein.

6. IT IS FURTHER ORDERED that PSO shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's rules, 47 C.F.R. § 43.61.

7. IT IS FURTHER ORDERED that PSO shall file a copy of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's rules, 47 C.F.R. § 43.51.

8. IT IS FURTHER ORDERED that PSO shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the United States and El Salvador within 90 days from the end of each calendar year.

9. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services PSO seeks authority to provide. The transmission of money is not considered to be a common carrier service.

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[1] PSO is a Florida corporation doing business as Giant Express.

[2] The Commission has concluded that the public interest in cost-based international telecommunications services would be served by the encouragement of international resale, provided that steps were taken to ensure that such resale did not excebarate the settlements deficit. The Commission, therefore, conditioned its resale policy by requiring U.S. carriers to permit resale of their international private lines only to those countries which afford equivalent resale opportunities. *See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Report and Order*, 7 FCC Rcd 559 (1992). Subsequently, the Commission stated that the resale of international private lines for the provision of international private line services, as opposed to switched services, does not implicate the settlements process to the extent such lines are used only to carry non-switched traffic that is not subject to the international settlements process, and thus clarified that the equivalency requirement does not apply to the resale of international private lines for private line services. Nevertheless, the Commission confirmed the right of an end user to interconnect its international private lines to the public switched network, through, for example, its own private branch exchange. *See Regulation of International Accounting Rates, CC Docket 90-337, Phase II Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992) (*"Phase II Third Further Notice"*).

[3] We note that should PSO obtain any interest in facilities beyond the authorized international point for providing common carrier services, including private line service between the United States and other international points, such action would constitute an extension of lines under Section 214 of the Communications Act. Therefore, under the provisions of the Commission's *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for PSO to file an additional application for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

11. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and El Salvador -- that is, private lines which originate in the United States and terminate in the El Salvador, or which originate in El Salvador and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switch network at either the United States or the foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under United States law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

12. This Order is issued under Section 0.291 of the Commission's rules, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-061

Application for Authorization under Section 214 of the Communications Act of 1934, as amended, to Acquire and Operate Capacity in the Germany-Denmark 1 Cable System for the Provision of its Authorized Services between Points in or Reached via the United States and Russia

ORDER AND AUTHORIZATION

Adopted: February 14, 1994; Released: February 25, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed by American Telephone and Telegraph Company ("AT&T") pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the acquisition and operation of capacity in the Germany-Denmark 1 Cable System for the provision of authorized services between points in or reached via the United States and Russia by AT&T.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-061 IS GRANTED and AT&T is authorized to:

a. acquire, on an Indefeasible Right of User ("IRU") basis, and operate half-interests in ten (10) Minimum Investment Units ("MIUs")[1] of capacity in the Germany Denmark 1 Cable System ("Germany-Denmark 1")[2]

b. acquire by lease or other comparable means such extension facilities as may be needed to extend the capacity to be acquired in Germany-Denmark 1; and

c. activate capacity in the TAT-10[3] and Germany-Denmark 1 Cable Systems and in the aforementioned extension facilities for the provision of its authorized services between the United States and Russia and certified points.

3. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section of 1.115 of the Commission's rules may be filed within 30 days of public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A MIU is defined as a 2.048 Mb/s digital bit stream, and consists of two half-interests which are intended for joint use between two correspondents, respectively.

[2] The Germany-Denmark 1 Cable System extends between landing points at cable stations at Norden, Germany and Maade, Denmark. AT&T has previously been authorized to acquire and operate capacity in Germany-Denmark 1 cable system. *See American Telephone & Telegraph Co.*, 6 FCC Rcd 4982 (1991); *American Telephone & Telegraph Co.*, 8 FCC Rcd 4379 (1993); *American Telephone & Telegraph Co.*, 8 FCC Rcd 5451 (1993). AT&T will pay an estimated sum of $128,000, plus an annual maintenance charge of approximately $3,800.

[3] The TAT-10 Cable System extends between landing points at cable stations located at Green Hill, Rhode Island; Norden, Germany; and Alkmaar, the Netherlands. AT&T was authorized to acquire and operate capacity in TAT-10 by *American Telephone & Telegraph Co.*, 8 FCC Rcd 4379 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

St. Thomas and San Juan Telephone Co., Inc. — File No. I-T-C-94-085-TC

STSJ Overseas Telephone Co. Inc.

and

Caribbean Telecommunications, Inc.

Application for Authority to Transfer Control of Section 214 Authorizations and Cable Landing Licenses from Douglas and Stanley Lapin *et al.* to Teracom Communications, Inc.

ORDER AND AUTHORIZATION

Adopted: February 10, 1994; Released: February 25, 1994

By the Chief, International Facilities Division:

1. On December 17, 1993, Teracom Communications, Inc. ("Teracom") and The St. Thomas and San Juan Telephone Co., Inc. ("STSJ") (collectively "the Applicants") filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, requesting authority to transfer control of STSJ and its subsidiaries,[1] from Douglas M. Lapin, Stanley P. Lapin, and Eileen Lapin, to Teracom. The application was placed on public notice on December 29, 1993. No comments were received.

2. STSJ is a U.S. international common carrier. STSJ, with its subsidiaries, operates a domestic and international communications network that provides interexchange switched voice services through the resale of the services of other carriers and through IRUs and ownership interests in terrestrial microwave, international cable, and domestic satellite facilities.[2] Services originate in the U.S. Virgin Islands, Puerto Rico, and the United States mainland and terminate at domestic and international points. STSJ and its subsidiaries are regulated as nondominant carriers on all routes.

3. Teracom, a Florida corporation, is not presently a carrier under Section 214 of the Communications Act. The majority of the stock of Teracom (91.67%) is owned by Warburg, Pincus Investors, L.P. ("Warburg"). Warburg is ultimately controlled by Lionel Pincus, a U.S. citizen. The other stockholders are Norman Klugman and Rudy McGlashan. All officers and directors of Teracom are U.S. citizens. Teracom has a total attributable alien ownership of 10.5%. Teracom's management principals, Messrs. Klugman and McGlashan, are experienced in the telecommunications business, and intend to spend a significant amount of their time managing STSJ.

4. The Applicants request authorization for a transfer of control of STSJ pursuant to an agreement entered into between them on December 15, 1993, whereby Teracom will acquire all of the stock of STSJ. The Applicants state that a grant of this application will serve the public interest because Teracom will infuse new capital into STSJ and will enable STSJ not only to maintain but also to improve and expand its services to the public. The Applicants state that to the extent that a grant of their application will foster the maintenance of strong and efficient service providers, it will further the Commission's policy of promoting competition in common carrier services.

5. After due consideration of the facts and circumstances presented by this application, we conclude that the transfer of control of STSJ and its subsidiaries from Douglas M. Lapin, *et al.* to Teracom would not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214; Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01; and "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§ 34-39, that the application of STSJ and Teracom, File No. I-T-C-94-085-TC, IS GRANTED and we consent to the transfer of control from Douglas M. Lapin, Stanley P. Lapin, and Eileen Lapin, to Teracom, of the pending and granted international Section 214 authorizations and interests in cable landing licenses listed in Appendix A.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that STSJ and its subsidiaries must continue to maintain tariffs for the authorized services listed in Appendix A.

8. IT IS FURTHER ORDERED that STSJ and its subsidiaries must continue to file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that STSJ and its subsidiaries may not -- and the tariffs of STSJ and its subsidiaries must state that their customers may not -- resell international private lines or connect them to the public switched network for the provision of international basic telecommunications services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

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[1] STSJ's subsidiaries holding Section 214 authorizations are STSJ Overseas Telephone, Inc., and Caribbean Telecommunications, Inc.

[2] *See* Appendix A for a list of STSJ's and its subsidiaries' pending and granted authorizations to provide these services.

10. IT IS FURTHER ORDERED that STSJ and its subsidiaries shall continue to comply with any current and future Commission policies and requirements concerning international accounting and settlement rates and shall file copies of any operating agreements entered into by STSJ or its subsidiaries that affect traffic or revenue flows to or from the U.S. within 30 days of its execution.

11. IT IS FURTHER ORDERED that neither STSJ nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which STSJ or any persons or companies controlling it or controlled by it are parties.

12. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

13. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Pending and Granted Section 214 Authorizations

St. Thomas and San Juan Telephone Co., Inc.

File No.	Cite	Purpose
I-T-C-94-023	Pending	International Direct Services
I-T-C-93-036	8 FCC Rcd 3644 (1993)	International Switched Voice Resale
I-T-C-93-030	8 FCC Rcd 5287 (1993)	AMERICAS-1 Cable System
I-T-C-93-029	8 FCC Rcd 5263 (1993)	COLUMBUS II Cable System
I-T-C-92-106	7 FCC Rcd 4266 (1992)	TAINO-CARIB Cable System
I-T-C-90-158	6 FCC Rcd 1963 (1991)	International Direct Services
I-T-C-90-075	5 FCC Rcd 6369 (1990)	International Direct Services
I-T-C-89-169	5 FCC Rcd 65 (1990)	International Direct Services
I-T-C-89-097-1	5 FCC Rcd 63 (1990)	International Switched Voice Resale
I-T-C-89-097	4 FCC Rcd 5469 (1989)	International Switched Voice Resale

Caribbean Telecommunications, Inc.

I-T-C-92-218	7 FCC Rcd 6853 (1992)	International Switched Voice Resale

STSJ Overseas Telephone Company, Inc.

I-T-C-90-120	5 FCC Rcd 5490 (1990)	International Switched Voice Resale

Cable Landing Licenses

St. Thomas and San Juan Telephone Company, Inc.

S-C-L-92-002	7 FCC Rcd 4275 (1992)	TAINO-CARIB Cable System
S-C-L-93-001	8 FCC Rcd 5038 (1993)	COLUMBUS II Cable System
S-C-L-93-002	8 FCC Rcd 5041 (1993)	AMERICAS-1 Cable System

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Alberto E. Garza — File No. 840004
Los Angeles, CA
Frequency Block B

And Seventeen Other Applicants
Selected in the September 15, 1993 Lottery
Seeking Licenses to
Build and Operate IVDS Systems

ORDER

Adopted: February 14, 1994; Released: February 25, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. This order addresses two petitions filed by Edward Johnson, an applicant for Interactive Video and Data Service ("IVDS") system licenses, challenging the IVDS applications selected in the IVDS lottery held September 15, 1993.[1] For the reasons that follow, the petitions are denied.

2. On August 10, 1993, Edward Johnson filed a Petition to Deny the eighteen IVDS applications to be selected in the September 15, 1993 lottery. In his petition, Johnson alleged that EON Corporation had impermissible agreements with IVDS applicants relating to funding the construction of their systems if selected. He also alleged that EON may have assumed *de facto* control of IVDS licenses even before the lottery. Johnson, however, provided no evidentiary support for his allegations beyond an EON press release stating that EON was planning to help fund the construction out of IVDS systems. Johnson did not identify the applicants who allegedly entered into agreements with EON, nor did he provide any further detail regarding the agreements.

3. With its opposition, EON Corporation has submitted the declaration of Geraldine L. Reynolds, an officer of the company with actual knowledge of EON's business dealings, which refutes Johnson's speculation. The declaration states that EON had not, as of October 1, 1993, entered into any agreements, contracts or understandings with IVDS applicants. Further, financing the construction of IVDS systems is not an impermissible activity for an IVDS equipment and programming supplier.

4. On October 1, 1993, Johnson filed another petition challenging the application of Alberto Garza, a selectee for one of two licenses in the Los Angeles market in the September 15, 1993 lottery. Johnson states that a Commission licensee must be a United States citizen and, therefore Garza's application cannot be granted.

5. Johnson's legal analysis is erroneous and his petition fails to present any evidence that the applicant is not qualified to be a Commission licensee. United States citizenship is not a requirement to be a licensee in this service. *Compare* 47 U.S.C. § 310. Garza has submitted a completed Form 574 on which he has certified that he is not a foreign government nor is a representative thereof.[2] Johnson's allegations regarding Garza's citizenship do not affect Garza's qualification to be a licensee.

6. For the reasons discussed above, IT IS ORDERED THAT the petitions filed by Edward Johnson on August 10, 1993, and October 2, 1993 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Private Radio Bureau

[1] Two applications in each of nine IVDS markets were chosen by lottery on September 15, 1993. The docket history relating to the creation of IVDS is recounted in Memorandum Opinion and Order, 8 FCC Rcd 6409 (1993).

[2] Garza filed a signed FCC Form 574 on September 22, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Interactive Video and
Data Service Lottery of
September 15, 1993

ORDER

Adopted: February 14, 1994; Released: February 25, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. This order addresses two petitions filed by Genesis Perpetual Trust, L.E. Smith, Trustee ("Genesis"). On September 21, 1993, Genesis filed a Petition to Invalidate Lottery and Notice of Litigation.[1] On November 22, 1993, Genesis filed a Petition to Deny or Designate for Hearing the eighteen applications selected in the September 15, 1993 lottery.[2] Both petitions seek to have the lottery invalidated and another lottery held including the applications filed by Genesis. Because Genesis failed to file its applications in time for them to be included in the lottery, both petitions are denied.

2. Genesis filed applications with Mellon Bank in Pittsburgh, PA on September 13, 1993, two days before the lottery. The last filing windows announced by the Commission for these IVDS markets opened and closed approximately a year earlier. Because of the late date of the filing, the applications were not included in the lottery.[3] The Genesis applications were dismissed by letter dated September 30, 1993.[4] Genesis filed an Application for Review on October 18, 1993 seeking review of that action.

3. Genesis failed to file applications during the filing windows opened during August and September 1992. Genesis also failed to file prior to the deadline announced in Public Notice, DA-93-935, released July 23, 1993, 58 Fed. Reg. 4427 (July 28, 1993) for corrections to the list of applicants to be included in the lottery.

4. The Courts have held that the filing of a timely application is a prerequisite for an applicant seeking to challenge licensing action. *Coalition for Preservation of Hispanic Broadcasting v. Federal Communications Commission*, 931 F.2d 73, 77 (1991). Genesis failed to timely participate in the IVDS rule making proceeding, and failed to timely file an application for an IVDS system license in markets 001-004 or 006-010. Parties aggrieved must avail themselves of the earliest available corrective step. *Id. See also*, 47 U.S.C. § 402.

5. Genesis chose to file so late that the Commission would be unable to process its applications in time to include them in the lottery. This choice was made at Genesis' risk, and should not prejudice the rights of other applicants who filed in a timely fashion.

6. On August 20, 1993, the Commission adopted a *Memorandum Opinion and Order*, 8 FCC Rcd. 6409 (1993) (published in summary form in the Federal Register at 58 Fed. Reg. 48459 (1993)), which denied a petition filed by a trust applicant in the IVDS rule making proceeding seeking to have its untimely applications accepted *nunc pro tunc*. Genesis has not provided any reason for distinguishing its applications from the trust applications at issue in that order.

7. Genesis has little hope of prevailing on the merits. Accordingly we will not defer granting licenses to the selectees.

8. For the above reasons, IT IS ORDERED THAT the petitions filed by Genesis Perpetual Trust to invalidate the lottery and deny the applications of the lottery selectees ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Private Radio Bureau

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[1] Maritime Communications Corp., Alberto E. Garza, Raveesh K. Kumra, ITV, Inc., Anthony J. Benison, Legacy TV, Inc., and Bay Interactive Ventures filed oppositions to the petition to invalidate the lottery on September 29, 1993. IVD Co. filed an opposition on September 30, 1993. Genesis filed a reply on October 12, 1993.

[2] On December 1, 1993, Bay Interactive Ventures Ltd., Cristina Del Valle, Ronald E. Dowdy, Alberto E. Garza, Ignacio Santos de Hoyos, J&M Partnership, Raveesh K. Kumra, Legacy TV Inc., and Luz Lobaton each filed an opposition. On the same day, IVD Co., Vinood K. Sood, Kingdon R. Hughes, and Anthony J. Benison filed a joint opposition. ITV Inc. filed an opposition on December 3, 1993.

[3] Public Notice, DA 93-935, July 23, 1993. A number of applications found unacceptable for filing were included conditionally in the IVDS lottery.

[4] Letter, Acting Chief, Special Services Branch, Licensing Division, Private Radio Bureau, 8 FCC Rcd 7590 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cristina Del Valle New York, NY Frequency Block B	File No. 840002
Alberto E. Garza Los Angeles, CA Frequency Block B	File No. 840004
Ignacio Santos De Hoyos Boston, MA Frequency Block A	File No. 840009
Luz Lobaton Houston, TX Frequency Block A	File No. 840017

Applications for licenses to
build and operate IVDS Systems

ORDER

Adopted: February 14, 1994; Released: February 25, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. This order addresses three petitions filed by Jan Reed, an applicant for Interactive Video and Data Service ("IVDS") system licenses, challenging several pending IVDS applications selected in the IVDS lottery held September 15, 1993.[1] For the reasons that follow, the petitions are denied.

2. On August 16, 1993, Jan Reed filed a Petition to Deny 92 IVDS applications, all of which listed one of two post office boxes as their mailing address.[2] After the IVDS lottery held September 15, 1993, Reed filed an addendum identifying Cristina P. Del Valle, Ignacio Santos de Hoyos and Luz Lobaton as IVDS lottery selectees whose applications are subject to her challenge.[3] In her addendum, Reed requests that the Commission investigate the citizenship of the applicants, determine who advanced the filing fees, and identify the real party in interest.

3. On October 15, 1993, Reed filed a Petition for Section 403 Inquiry.[4] In this petition, Reed requests that the Commission investigate the conduct of aliens who are selectees in the IVDS lottery. She asserts that three of the four selectees are part of the "San Antonio, Texas filing scheme." Reed simply alleges that a scheme existed, without presenting any evidence other than the use by multiple applicants of a common post office box.

4. On November 12, 1993, Jan Reed filed another petition again challenging the Del Valle, Lobaton, Santos de Hoyos applications as well as an application filed by Alberto Garza, another IVDS lottery selectee.[5] In this petition, she incorporates by reference her earlier petitions, and argues that the grant of IVDS licenses to aliens is contrary to the public interest.

5. Jan Reed's petitions fail to present any evidence that the applicants are not qualified to be Commission licensees. She merely asserts that 92 applicants have utilized one of two post office boxes to receive correspondence from the Commission. Reed then calls this the "San Antonio filing scheme." This is not sufficient evidence to warrant commencing the investigation Reed requests.

6. Further, these applicants have each submitted declarations with their oppositions. In these declarations, the applicants state that they are each residents of Mexico, and as such retained a courier service with a U.S. P.O. box address to deliver their mail in Mexico without undue delay. Each has declared under penalty of perjury that he or she is the real party in interest in each application.

7. United States citizenship is not a requirement to be a licensee in this service. *Compare* 47 U.S.C. § 310. Each of the above applicants has submitted a completed Form 574 on which each has certified that he or she is not a foreign government nor is a representative thereof.[6] Jan Reed's speculation regarding the citizenship of the applicants does not affect their qualification to be licensees.

8. Ms. Reed has not demonstrated that the public interest requires us to disqualify aliens from holding licenses in this service. In light of the fact that the Commission did not exclude aliens from eligibility for IVDS licenses in the rule making proceedings, we find that it is not contrary to the public interest to allow aliens to hold these licenses.

9. For the reasons discussed above, IT IS ORDERED THAT the petitions filed by Jan Reed on August 16, 1993, October 15, 1993, and November 12, 1993 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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[1] Two applications in each of nine IVDS markets were chosen by lottery on September 15, 1993. The docket history relating to the creation of IVDS is recounted in Memorandum Opinion and Order, 8 FCC Rcd 6409 (1993).

[2] Of the 92 applications, 66 listed a mailing address of P.O. Box 171347, North Broadway Station, San Antonio, Texas Zip Code 78217 and 36 listed a mailing address of P.O. Box 171385, North Broadway Station, San Antonio, Texas Zip Code 78217.

[3] Addendum to Petition To Deny For Identification Purposes filed September 24, 1993. The certificate of service attached to Jan Reed's initial petition indicates that she did not serve each of the 92 applicants, but instead addressed service copies to the occupant of each of the P.O. boxes. The addendum was served upon the three lottery selectees. Cristina Del Valle and Luz Lobaton each filed an opposition on October 7, 1993; and Ignacio Santos de Hoyos filed an opposition on October 14, 1993.

[4] Cristina Del Valle, Luz Lobaton, and Ignacio Santos de Hoyos filed oppositions to the Petition for Section 403 Inquiry on October 26, 1993. Alberto E. Garza filed an opposition on October 29, 1993.

[5] Petition to Deny or Designate for Hearing filed November 12, 1993. Cristina Del Valle and Luz Lobaton each filed an opposition to this petition on November 22, 1993. Alberto E. Garza and Ignacio Santos de Hoyos filed oppositions on November 24, 1993. Jan Reed filed a reply on December 3, 1993.

[6] Del Valle, Garza, Lobaton and Santos de Hoyos each filed an FCC Form 574 on September 22, 1993.

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUGHES COMMUNICATIONS GALAXY, INC. File No. 2-DSS-STA-94

Application for Special Temporary Authority for the Galaxy I-R(S) Domestic Fixed-Satellite

ORDER

Adopted: February 9, 1994; Released: February 25, 1994

By the Domestic Facilities Division:

1. Hughes Communications Galaxy, Inc. (Hughes) has requested special temporary authority to operate its Galaxy I-R(S) domestic fixed-satellite assigned to 133^0 W.L. at 141^0 W.L. for an eight-week period, commencing upon launch, to test the satellite. No comments or oppositions were filed. For the reasons discussed below, Hughes's request is granted.

2. Galaxy I-R(S) has been authorized as a replacement for Hughes's Galaxy I satellite, which is operating at the 133^0 W.L. orbital location.[1] Hughes plans to launch Galaxy I-R(S) in February 1994 and anticipates that Galaxy I will still be operating. Prior to commencing regular operation, Galaxy I-R(S) needs to be tested. Hughes anticipates that this testing process will take approximately four to eight weeks. It notes it would not be feasible to test Galaxy I-R(S) at 133^0 W.L. while Galaxy I is still operating because it would cause service disruption to customers on Galaxy I.

3. Further, Hughes states that it had been granted authority to test its Galaxy I-R satellite at 141^0 W.L. in 1992[2] and that no new issues are presented by this request. Hughes adds that GE American Communications, Inc. (the joint licensee of Aurora II at 139^0 W.L.) has already agreed to Hughes's test plan at the 141^0 W.L. location. Hughes confirms that its will comply with the test plan. In addition, Hughes states it will promptly move the Galaxy I-R(S) satellite to its assigned 133^0 W.L. location upon completion of testing.

4.Granting the Hughes request will serve the public interest, convenience and necessity. Testing at 141^0 W.L. will allow Hughes to continue to provide service to its Galaxy I customers while insuring that the replacement satellite for Galaxy I is fully operational before it is placed into service. In addition, the parties have agreed to a plan that will assure that harmful interference does not occur. We therefore grant this request.

5. Accordingly, IT IS ORDERED that Application File No. 2-DSS-STA-94 IS GRANTED.

6. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. IS AUTHORIZED to test Galaxy I-R(S) at the 141^0 W.L. orbital location for an eight week period after the satellite is launched, in accordance with the test plan submitted on November 10, 1993. At the expiration of this period, Galaxy I-R(S) must be moved to its regularly assigned location of 133^0 W.L.

7. IT IS FURTHER ORDERED that no harmful interference shall be caused to any other lawfully operated radio station and Hughes Communications Galaxy, Inc. shall cease operation immediately upon notification of interference.

8. IT IS FURTHER ORDERED that Hughes Communications Galaxy, Inc. shall notify the Commission in writing no later than seven days after the testing of Galaxy I-R(S) is completed.

9. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *See* Hughes Communications Galaxy, Inc., 8 FCC Rcd 5089 (1993).

[2] *See* Hughes Communications Galaxy, Inc., 7 FCC Rcd 3646 (1992). Galaxy I-R was destroyed due to the failure of its lauch vehicle.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 17, 1994

CC Docket No. 91-141

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PETITION FOR WAIVER OF RULES GOVERNING NONRECURRING RECONFIGURATION CHARGES

In its *Second Memorandum Opinion and Order on Reconsideration* in CC Docket No. 91-141 (8 FCC Rcd 7341), the Commission expanded its requirements governing the application of nonrecurring reconfiguration charges. On February 7, 1994, the New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition seeking a waiver of those requirements.

The *Second Memorandum Opinion and Order on Reconsideration* requires, among other things, that if a local exchange carrier (LEC) waives nonrecurring reconfiguration charges for LEC special access or transport services, it must not charge customers who reconfigure in order to take service pursuant to an expanded interconnection arrangement more than an amount reflecting the difference between the costs of the two different types of reconfigurations. The Commission stated that NYNEX's tariffs appeared to violate the standards set forth in that order. The Commission also stated that it would consider requests for waiver of the requirements if a LEC can demonstrate that any differential treatment would not undermine competition or otherwise violate the Communications Act.

NYNEX states that its current DS1 to DS3 service rearrangement charge is zero, while its charge for rollovers to an expanded interconnection multiplexing node is approximately $285.00. NYNEX states that it believes that this rate structure conforms to the Commission's decision, but to the extent that its nonrecurring rollover charges are not in compliance with Commission rules, NYNEX seeks a waiver. NYNEX states that it reduced its DS1 to DS3 service rearrangement charge to zero to encourage customers to upgrade their services to fiber based transmission services, which NYNEX asserts are more efficient for NYNEX to provide and maintain. NYNEX also states that this change allows it to provide its customers with the same rate structure offered by competitive access providers, who it says represent a strong competitive force in the NYNEX region.

Interested parties are to file comments on this petition for waiver by **March 21, 1994**, and reply comments by **April 5, 1994**, with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Southwest Incorporated AAD 93-94

and

EagleNet, Inc.

Petition for Waiver of the
Definition of "Study Area" contained
in Part 36, Appendix-Glossary
of the Commission's Rules

and

EagleNet, Inc.

Petition for Waiver of Sections 61.41(c)
and 69.3(e)(11) of the Commission's
Rules

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1994; Released: February 18, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On July 27, 1993, GTE Southwest Incorporated (GTE), a wholly-owned subsidiary of GTE Corporation, and EagleNet, Inc. (EagleNet), a newly created, wholly-owned subsidiary of Panhandle Telephone Cooperative, Inc. (Panhandle), filed a joint petition for waiver of the definition of study area contained in the Appendix-Glossary of Part 36 of the Commission's rules to effectuate the proposed sale of 14 GTE exchanges in Oklahoma to Eaglenet. On the same day, EagleNet filed a petition for waiver of Sections 61.41(c) and 69.3(e)(11) of the Commission's rules, requesting permission to remain a cost company and NECA pool participant rather than converting to price cap regulation. After receiving regulatory approval and acquiring the exchanges, Panhandle intends to sell some of the acquired exchanges to the Pioneer Telephone Cooperative. We released a public notice soliciting comments on the petition.[1] The National Exchange Carrier Association (NECA) and National Telephone Cooperative Association (NTCA) filed comments in support of the petition. In addition, a number of letters supporting the transaction were sent to the Commission. Finally, on September 7, 1993, GTE submitted a folder of supplemental information on the transaction.[2]

I. STUDY AREA WAIVER

2. A study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform their jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[3] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[4] There are three primary concerns in study area boundary change petitions: first, that the change not adversely affect the Universal Service Fund (USF) support program;[5] second, that the state commission(s) having regulatory authority have no objection to the change;[6] and finally, that there is strong public interest support for a waiver.

Petition

3. The fourteen exchanges that GTE proposes to sell to EagleNet serve 12,562 access lines in Oklahoma, with one exchange extending into Texas. The fourteen exchanges involved in this transaction currently receive USF support as part of GTE's Oklahoma study area, which has an average cost per loop of $363 and receives $6,714,677 in USF support.[7] The estimated cost per loop for the fourteen exchanges, by themselves, is $413; thus these exchanges, as a separate study area, with their 12,562 access lines, would receive $1,246,077 in USF support.[8] GTE estimates that its Oklahoma study area, without these fourteen exchanges, would have received $5,474,741 in annual USF support.

4. Petitioners argue that the public interest would be served by grant of the waiver. The fourteen exchanges under consideration are remote from GTE's current operations, but near the existing base of Panhandle's operations, they state.[9] Subscribers will benefit from the resulting geographic consolidation, and from EagleNet's plans for technological improvements, including fully digital central

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[1] Public Notice, AAD 93-94, 8 FCC Rcd 5547 (Com. Car. Bur. 1993).

[2] Hereinafter, "Supplemental Filing."

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (January 8, 1985) (*1985 Order Adopting Recommendation*).

[4] 47 C.F.R. Part 36, Appendix-Glossary.

[5] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[6] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[7] Supplemental Filing Table 3, p.1. USF support is based on the average cost per loop in the study area, compared to the national average cost per loop. The study area cost per loop must be at least 115% of the national average per loop in order to qualify for USF support. The national average is currently $237.39, so the threshold for receiving USF support is $272.99.

[8] Supplemental Filing Table 3, p.1.

[9] Joint Petition at 1-2.

offices within five years, they state.[10] Petitioners also provided a copy of the Corporation Commission of the State of Oklahoma order authorizing the proposed sale.[11]

Discussion

5. The Petitioners contend that customers in these exchanges will be better served by EagleNet than by GTE. In addition, the Corporation Commission of the State of Oklahoma has unequivocally expressed its support in approving the transaction, and the petition is not opposed by any party. Moreover, based on the Petitioners' estimates, granting the study area waivers would increase the USF support by approximately $6,141 annually for Eaglenet and GTE, operating as separate study areas, an amount that in context is *de minimis*.[12] Our independent analysis also indicates that the direct effects of this transaction will, most likely, also be *de minimis*. We thus conclude that the petitioners have made a sufficient showing that allowing this transaction to go forward will improve customer service, promote the public interest, and therefore that a waiver is warranted.

6. Panhandle, however, proposes to establish a new, second study area in Oklahoma, consisting of the fourteen exchanges that Panhandle's wholly owned subsidiary, EagleNet, intends to operate. This would be in conflict with the Joint Board's recommendation and the Commission's adoption of the study area freeze policy that were directed to preventing the subdivision of study areas by companies to gain an advantage under the USF and jurisdictional separations rules.[13] Allowing GTE to subdivide these exchanges while retaining ownership would be a clear violation of this policy. We believe that allowing Panhandle to obtain these exchanges and set them up as a study area separate from its other operations in Oklahoma would have adverse jurisdictional separations implications, and therefore is inconsistent with the Commission's policy of deterring subdivision of a company's operations within a single state.[14] In addition, as a general matter, increasing the number of study areas increases the administrative burden of regulation of the local exchange carrier industry and, specifically, the USF and DEM weighting programs. No reasoning, or other support, is offered by the Petitioners to justify segregating exchanges, into a separate study area, that logically should be consolidated into Panhandle's study area. As a consequence, on the record before us, there is no basis for concluding that it is necessary to establish a new, separate study area for EagleNet. We thus grant the study area waiver petition to permit GTE to exclude these exchanges from its Oklahoma study area, and to permit Panhandle to include these exchanges in its study area.

II. PRICE CAPS WAIVER

7. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[15] Under this rule, Panhandle/EagleNet's acquisition of the GTE exchanges obligate them to exit the NECA pools and become subject to price cap regulation. They request waiver of this rule, contending that the rule's application here would be contrary to the public interest.[16] They state that they are committed to upgrading the quality of local exchange service in Oklahoma by installing digital central offices within 5 years. They argue that they are participating in the NECA pools as small companies, and that continued participation in the pools is essential to their economic viability and to the maintenance of telephone service for their customer base. They also request waiver of the concomitant effects of § 69.3. They state that there is no relationship among the parties to the proposed sale that would allow any of these companies to shift costs as a consequence of the sale.

8. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[17] The rationale for this rule is explained in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[18] The Commission noted, however, that "in some cases, the efficien-

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[10] *Id.* at 2.

[11] Corporation Commission of the State of Oklahoma Order, Cause No. PUD 930001532, Order No. 375557, dated July 26, 1993. There are 205 subscribers in the state of Texas that will be affected by the transaction. According to GTE, the rates and service for those subscribers have traditionally been regulated by the Oklahoma Commission. Letter from E. Shimizu, GTE, to J. Spindler, FCC, dated Nov. 19, 1994. The Texas Public Service Commission was notified by letter of the proposed transaction and voiced no opposition. *See* Letter from L. Kamerman, GTE, to R. Curry, Public Utility Commission of Texas, dated July 19, 1993.

[12] Petitioners estimate the post-transaction USF amounts to be $6,720,818 for GTE Oklahoma and EagleNet. The pre-transaction USF amount was $6,714,677 which was total GTE Oklahoma (which includes the fourteen exchanges in the study area). Therefore, the estimated change in USF is $6,141.

[13] *See 1984 Joint Board Recommended Decision, and 1985 Order Adopting Recommendation, supra.*

[14] We note that if Panhandle were to maintain a separate study area for these exchanges, it would increase its interstate allocation of its local switching investments through the DEM weighting factors. *See* 47 C.F.R. § 36.125.

[15] 47 C.F.R. § 61.41(c)(2). EagleNet also requests waiver of a related rule, Section 69.3(e)(11), to allow EagleNet to participate in the NECA pools.

[16] EagleNet's parent, Panhandle Telephone Cooperative, Inc. joins in this request for waiver.

[17] Policy and Rules Concerning Rates for Dominant Carriers, *Second Report and Order*, 5 FCC Rcd 6786 (1990) and *Erratum*, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order), modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order), petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modified on recon.*, 6 FCC Rcd 4524 (1991) (*ONA/Part 69 Order), petitions for recon. of ONA/Part 69 Order pending*, District of Columbia Public Service Commission v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991), *appeals of LEC Price Cap Order affirmed sub nom.* National Rural Telecom Association V. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[18] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

cies created by the purchase and sale of [a few] exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule."[19]

9. There is good cause to grant EagleNet, and Panhandle, a waiver of the all-or-nothing rule. The first concern underlying adoption of the rule -- cost-shifting between affiliates -- is not at issue here. Neither EagleNet, nor GTE, is seeking to maintain separate affiliates under different systems of regulation. The second concern -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- likewise appears inapplicable this case. Except for exchanges that it has sold, GTE remains regulated under price caps; it retains no ability to bring any exchange it has sold back under price caps.

10. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[20] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers smaller than the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the "all-or-nothing" rule should take into account the companies' preferences, particularly for small carriers.

11. We therefore grant a waiver of Section 61.41 of our rules. For the present, EagleNet/Panhandle will continue to be regulated under rate of return. Because we are waiving Section 61.41, Panhandle need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, Panhandle/EagleNet are free to elect price cap regulation in the future, provided they withdraw from the NECA pools.

12. We note that this sale of exchanges by GTE is only one of many planned sales or trades of exchanges. Because GTE's price cap indexes were established with these exchanges as part of its network, the numerous sales of exchanges by GTE will most likely significantly alter the network costs that comprise the basis of its price caps indexes. Accordingly, the granting of these waivers should not be construed as precluding a possible reevaluation of GTE's price cap indexes to reflect the effects of these sales.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 155(c), and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the Joint Petition of GTE Southwest Incorporated and EagleNet, Inc. for waiver of Part 36, Appendix-Glossary, of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent discussed above.

14. IT IS FURTHER ORDERED that the Petition of EagleNet, Inc. and Panhandle Telephone Cooperative, Inc. for waiver of Section 61.41(c)(2) of the Commission's rules, 47 C.F.R. § 61.41(c)(2), IS GRANTED.

15. IT IS FURTHER ORDERED that the Petition of EagleNet, Inc. for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. § 69.3(e)(11), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[19] *Id.* at note 207.

[20] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 1, 1994

PACIFIC BELL FILES WAIVER FOR REALLOCATION OF NONREGULATED POWER AND COMMON EQUIPMENT INVESTMENT

Public Comment Invited

Comments: March 28, 1994
Reply Comments: April 12, 1994

On December 30, 1993, Pacific Bell (Pacific) filed a petition for waiver to reallocate the amount of Power and Common (P&C) investment associated with nonregulated activity in Account 2212, Digital Electronic Switching. According to Pacific, the reallocation would actually be a recalculation of the amount of P&C investment associated with Voice Mail and California Call Management activities which were transferred to Pacific Bell Information Services on January 1, 1993. Pacific states this change will not be detrimental to ratepayers and requests expeditious consideration of this petition for waiver.

Parties may file comments on Pacific's proposed reallocation of its P&C investment associated with Voice Mail and California Call Management activities no later than **March 21, 1994**. Replies should be filed by **April 5, 1994**. Comments and replies should reference AAD 94-21. A copy of each pleading should be sent to Ed Dashkin, FCC Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C., 20554 and International Transcription Services, Inc., (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20554, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Ed Dashkin (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CORPORATE TELECOM SERVICES, INC. File No. 10274-CL-P-537-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 537, Nebraska 5-Boone

MEMORANDUM OPINION AND ORDER

Adopted: February 15, 1994; Released: March 1, 1994

By the Commission:

I. INTRODUCTION

1. In this Order, we address an application for review filed by Corporate Telecom Services, Inc. (CTSI) that seeks reversal of *Corporate Telecom Services, Inc.*, 6 FCC Rcd 5814 (Com. Car. Bur. 1991) (*Order*), which upheld an earlier action by the Mobile Services Division (MSD) that returned the referenced application as unacceptable for filing.[1] The application for review is unopposed. For the reasons discussed below, we deny CTSI's application for review.

II. BACKGROUND

2. CTSI, which is a wholly-owned subsidiary of SSE Telecom, Inc. (SSE), a publicly-traded corporation, was designated tentative selectee of the Nebraska 5 - Boone Rural Service Area (RSA) following a lottery held by the Commission on May 5, 1989. On June 21, 1989, CTSI tendered an amendment to its application, reflecting a corporate reorganization that had taken place on February 23, 1989. In its amendment, CTSI advised the MSD that because SSE faced severe financial hardship, it was forced to seek an infusion of new capital through a private placement of equity interests in SSE. The recapitalization resulted in a group of new investors receiving approximately 65 percent ownership of SSE.[2] Included in the group was Frank Trumbower, one of SSE's original stockholders, whose derivative interest in CTSI increased from approximately 4 percent to more than 16 percent. Trumbower also holds an interest in First Cellular Limited Partnership (First Cellular), a competing applicant for the Boone market.

3. Section 22.922 of the Commission's Rules prohibits any alienation of any interests in a pending application to provide service to a RSA. Section 22.921(c)[3] of the Commission's Rules prohibits any party from holding a 5 percent or greater interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations. SSE sought to avoid running afoul of these restrictions by using a stock trust through which the current owners of SSE would continue to hold their indirect interests in CTSI, unaffected by the recapitalization. The stock trust[4] was to be for the benefit of the public stockholders of SSE and not for the owners of the privately placed stock. According to CTSI, control of CTSI was, therefore, transferred from SSE to the stock trust's trustee. Wilbur Pritchard, SSE's president and principal stockholder, was installed as trustee, subject to strict fiduciary responsibilities, which were designed to assure that neither *de jure* nor *de facto* control of CTSI would be altered by the change. In other words, it was intended that CTSI would remain under the control of SSE's original stockholders and Trumbower's share in CTSI would remain at 4 percent, SSE's recapitalization notwithstanding.

4. The MSD rejected the proffered interpretation of the facts. It found the trust mechanism ineffective in insulating SSE from CTSI. The MSD reached this conclusion principally because of Pritchard's substantial affiliation with SSE and his stated intention to transfer CTSI's interest in the subject application to the new stockholders of SSE. Moreover, due to the trust's ineffectiveness, the MSD found that CTSI also failed in its attempt to avoid the Commission's cross-ownership ban, concluding that since Trumbower's position in CTSI has exceeded the 5 percent bench mark for attributable interest in a publicly held corporate applicant, he owns an impermissible interest in more than one application in the same market. The MSD also concluded that even if it were assumed that the trust did insulate SSE from CTSI, dismissal would still be warranted. The MSD reasoned that the fact that CTSI is now controlled by the trustee means that it can no longer be considered to be a publicly-traded corporation within the meaning of Section 22.921(c) of the Commission's Rules, and thus entitled to the 5 percent cross-ownership exception. The MSD also denied CTSI's request for waiver of the same sections of the rules because it concluded that CTSI had failed to demonstrate that a waiver was justified.

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[1] *See* letter from Chief, MSD, to H. Solomon (dated May 2, 1990), which addressed a petition for waiver and cut-off exemption filed July 7, 1989 and two attendant letters filed January 19, 1990 and April 17, 1990.

[2] At the time of the recapitalization, neither CTSI nor any of SSE's other subsidiaries held a Commission authorization. Consequently, prior Commission approval of the reorganization was not required, even though it resulted in the transfers of control of both SSE and CTSI. *See* 47 U.S.C. § 309(d).

[3] The Commission, in *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185 (1991), changed the numeration of this rule section from 22.921(b)(2) to 22.921(c). The text of the rule section was not altered, however.

[4] A voting or stock trust is an arrangement whereby a group of stockholders of a corporation, for a specified period of time, divorce their voting rights from ownership. During this period, control over the stock is voted by the trustee pursuant to the terms of the trust instrument.

5. The MSD's findings and action were subsequently affirmed *in toto* by the Common Carrier Bureau (Bureau). Now CTSI is requesting that we overturn the *Order* and reinstate CTSI as the tentative selectee of the Nebraska 5 - Boone RSA.

III. DISCUSSION

6. CTSI submits that the *Order* should be reversed because it contains inadequate and erroneous findings of fact, ignores other important and material facts, and draws incorrect conclusions of law. According to CTSI, the trust agreement used by CTSI and SSE adequately avoided attribution under Section 22.921 of the Rules, and there is no legal support for the Bureau's determination that CTSI is no longer a publicly traded corporation. Alternatively, and in view of the special circumstances presented in this case, CTSI asks that it be granted a waiver of Section 22.921.

7. Specifically, CTSI contends that the Bureau incorrectly applied the multiple ownership policies of broadcast facilities in its analysis of the trust agreement. The Bureau's reliance on those policies, claims CTSI, was clearly erroneous because the underlying rationale of the broadcast policies has no applicability to the Commission's cellular ownership policies. The rules governing the multiple ownership of broadcast facilities, claims CTSI, were designed to assure the diversity of ownership to maximize diversification of programming and service, and in adopting these rules, the Commission recognized that even a minimal ownership in a broadcast licensee could confer a sufficient degree of influence or control over the licensee. The harm that Section 22.921 seeks to prevent, argues CTSI, is unwarranted economic benefit gained by an applicant through filing multiple cellular license applications for a single market. Consequently, submits CTSI, there was no justification for the Bureau to conclude that the close relationship of trustee and grantor invalidated the trust, especially since Trumbower's new investment in SSE did not provide any economic benefit to him once the application was transferred to the trust.

8. CTSI's argument is unavailing. SSE established the voting trust in an effort to separate CTSI from SSE's new shareholders. The Bureau found that this effort failed. CTSI has not shown this finding to be erroneous. The Bureau's finding was not, as asserted by CTSI, based on a misapplication of Commission policies concerning the ownership of broadcast facilities. Rather, the Bureau correctly concluded that SSE's efforts to comply with the requirements of Section 22.921(c) failed because the trust arrangement it structured did not comport with fundamental trust principles, which are equally applicable to broadcasters and common carriers. *Order*, 6 FCC Rcd at 5815 ¶¶9-11. The fact that the trust was intended, in this case, to avoid a prohibited alienation of ownership interest, rather than a concentration of ownership of broadcast facilities, does not alter the analysis. Specifically, the Bureau found that the trust arrangement was deficient because it did not adequately establish the independence of the trustee from both the grantor and the beneficiary of the trust.[5]

9. As mentioned above, SSE's decision to raise needed capital by issuing additional stock resulted in a *prima facie* violation of Section 22.921(c) because one of SSE's shareholders, Trumbower, already held a cognizable interest in another applicant in the same market, and the cross-interest was attributable to CTSI through SSE. Furthermore, since Trumbower failed to divest himself of his interest in the other application, it was incumbent upon SSE effectively to insulate its original shareholders from those resulting from its equity placement.[6]

10. The Bureau correctly found that SSE's efforts were inadequate. In light of the fact that the appointed trustee was also SSE's largest single shareholder (48 percent), its chief operating officer, and the chairman of its board of directors, the Bureau could not reasonably conclude that the trustee possessed the independence demanded in these situations.[7] Moreover, CTSI does not support its argument that insulation of the trustee is not required when a trust is used in conjunction with cellular radio service applications if there has been no economic benefit realized. This argument overlooks our stated policy of strictly enforcing Section 22.921 in order to assure administrative fairness to those who comply with our cellular radio service cross-ownership restrictions, the lack of economic gain notwithstanding.[8] The same holds true for CTSI's claim that waiver is warranted because the parties, in creating the trust, were seeking to avoid violating Section 22.921. Therefore, we affirm the Bureau's conclusion that CTSI did not comply with the Commission's cross-ownership restrictions. The trust SSE created did not adequately insulate CTSI from SSE, and Trumbower's presence resulted in CTSI's violating Section 22.921(c) of the Commission's Rules.

11. Nor do we find that CTSI has established good cause to warrant our waiving the enforcement of Section 22.921. Violation of the Commission's cross-ownership restrictions could have been avoided easily by either selecting a disinterested third party as trustee or by Trumbower's divesting himself of his interest in First Cellular.[9] Neither option was taken. In light of this fact, we see no grounds for the extraordinary relief that CTSI now seeks.

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[5] *See, e.g., Order*, 6 FCC Rcd at 5815 ¶ 8; FTC Communications, Inc., 75 FCC 2d 15 (1979); Wolverine Cablevision, Inc., 69 FCC 2d 1487 (1978); Communications Industries, Inc., Mimeo No. 0770 (Com. Car. Bur. Nov. 8, 1985).

[6] CTSI appears to have abandoned its contention that Trumbower had effectively renounced his interest in the other application. *See* 6 FCC Rcd at 5815 ¶ 7.

[7] *Cf.* Chickasaw Telephone Company for the Benefit of CTC Trust, 8 FCC Rcd 600 (1993), *appeal filed*, No. 93-1175 (D.C. Cir. Feb. 24, 1993). A trust created by a telephone company (wireline carrier) was declared invalid when proffered as a non-wireline applicant because the trustee was also a principal of the telephone company.

[8] *See* Florida Cellular Mobil Communications Corporation, 6 FCC Rcd 6910 (1991), *recon. denied*, 7 FCC Rcd 7856 (1992); *see also* Progressive Cellular III B-3, 6 FCC Rcd 7178 (1991), *aff'd*, No. 92-1006 (D.C. Cir. Feb. 2, 1993)(per curiam). In any event, the purpose of this was to preserve CTSI's status as selectee in this market, an economic benefit that CTSI continues to pursue.

[9] We expect cellular applicants to exercise due diligence in their efforts to comply with the cross-ownership restrictions. *See* Florida Cellular Mobil Communications Corporation, *id.*

12. Finally, since our finding that the stock trust was not an effective means of preventing the prohibited alienation of ownership interest in CTSI disqualifies CTSI as an applicant for the Boone market, we need not address the question of whether CTSI would still be considered, within the context of Section 22.921(c), a publicly-traded corporation if the subject trust were found to be valid. This issue is now moot.

IV. CONCLUSION

13. The issues raised by CTSI in its application for review of the *Order* have been fully and carefully examined and no reversible error has been found

V. ORDERING CLAUSE

14. Accordingly, IT IS ORDERED THAT the Application for Review filed by Corporate Telecom Services, Inc., in the above-captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-305

In the Matter of

Amendment of the Amateur Service
Rules to Implement a Vanity Call
Sign System.

ORDER EXTENDING TIME FOR COMMENTS

Adopted: February 23, 1994; Released: March 1, 1994

By the Chief, Private Radio Bureau:

1. On January 26, 1994, The American Radio Relay League, Inc. (ARRL) requested that the time for filing comments in the above-captioned proceeding be extended from March 7, 1994, to and including April 21, 1994.

2. In its request, ARRL states that it needs time, beyond that available under the current comment deadline, to evaluate the input of its members. Further, ARRL states that after such evaluation is complete, it requires time to adopt a position and prepare its comments. According to ARRL, the importance of a proceeding concerning call sign selection warrants the requested extension of time.

3. The Commission does not routinely grant extensions of time. In this instance, however, it is desirable that the record be as complete as possible and that it reflect the views of the amateur community concerning the proposed vanity call sign system. Accordingly, IT IS ORDERED, that the deadline for filing comments in this proceeding IS EXTENDED to and including April 21, 1994, and that the deadline for filing reply comments IS EXTENDED to and including May 23, 1994.

4. This action is taken pursuant to the authority found in Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and in Sections 0.131(a) and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131(a) and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mr. John H. White File No. BPH-910122MB

For a Construction Permit
for a New FM Station at
La Crosse, Wisconsin.

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 1994; Released: March 1, 1994

By the Commission:

1. The Commission has under consideration an Application for Review, filed on behalf of John H. White, seeking reinstatement of his application, *nunc pro tunc*, for a new FM station at La Crosse, Wisconsin.

2. Mr. White's application was dismissed because his hearing fee was submitted two weeks after July 15, 1991, the date established for filing hearings fees for mutually exclusive applications pending at the time the Commission revised its comparative hearing rules. *See Proposals to Reform the Commission's Comparative Hearing Process*, 56 Fed. Reg. 25636 (1991). The Managing Director denied Mr. White's initial request for reinstatement, and Mr. White filed this appeal.

3. Mr. White explains that his hearing fee payment should be treated as having been timely filed, and his application reinstated, because the timing of his hearing fee payment was governed by a rule amendment adopted after he had filed his application and further that the Commission had failed to provide personal notification of the changes in its filing procedures. In the alternative, Mr. White requests a waiver of the fee requirement contending that his dismissal was unduly harsh because his attorney, due to a clerical error, did not discover that his application was subject to the new filing requirement. Mr. White also observes that he filed the fee as soon as he became aware of the requirement. Moreover, Mr. White contends that the Managing Director's return of his hearing fee was inconsistent with the Commission's earlier actions reinstating applications for failure to comply with the hearing fee requirement, citing *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988).

4. We affirm the decision of the Managing Director. No Commission action gave rise to an expectation that notice of changes in our fee rules would be personally served on pending applicants. Section 552(a)(1) of the Administrative Procedure Act provides that notice of a rule revision timely published in the Federal Register constitutes adequate notice in those instances where a person does not receive actual notice. 5 U.S.C. § 552(a)(1). Thus, we are satisfied that our notice of the revisions to our hearing fee rules was adequate. Moreover, it appears that Mr. White's attorney was, in fact, aware of the revised rule requirement.

5. Further, the failure by Mr. White's attorney, due to an office oversight, to discover that his application was accepted for filing prior to July 1, 1991, and, hence, to recognize that the new filing requirement applied to him, does not warrant a waiver of the fee requirement. Our decision adopting new filing requirements clearly stated that *"failure to make the hearing fee payment in a timely manner will result in the dismissal of the underlying application."* (emphasis in the original). *See Proposals to Reform the Commission Comparative Hearing Process*, 6 FCC Rcd 3403, 3408 (1991). Moreover, from the beginning of our fee collection program, we have required that fee payments be timely made in order to avoid the additional costs underlying a billing and collection system. *See* 47 C.F.R. §§ 1.1107, 1.1110; *see also Establishment of a Fee Collection Program to Implement the Consolidated Omnibus Budget Act of 1985* 2 FCC Rcd 947, 956-57 (1987), *recon. denied*, 3 FCC Rcd 5987, 5991 (1988). If we were to accept clerical or attorney error as a basis for waiver of this requirement, our ability to strictly enforce our rules would be severely undermined. Indeed, we note that attorney error is not in other contexts considered an adequate reason to waive important procedural rules. *See Virginia RSA 6 Cellular Limited Partnership*, 7 FCC Rcd 8022 (1992). Thus, we do not find the dismissal of Mr. White's application to have been unduly harsh, and we, therefore, deny his request for waiver.

6. Finally, we reject Mr. White's contention that our action concerning an earlier applicant constitutes sufficient grounds for reinstating his application. Unlike the circumstances present in the instant case, *St. Croix, supra*, involved the reinstatement of an applicant following the late filing of a notice of appearance. The Commission determined there that the purpose underlying notices of appearance was not disserved by grant of a waiver since the applicant had made clear by other actions that he intended to participate. Timely payment of the hearing fee was not at issue because the parties filed a settlement agreement in lieu of any hearing fee payments. *See* 3 FCC Rcd at 4074. The *St. Croix* decision does not control our action here. In sum, Mr. White has brought no decision to our attention in which we or the Managing Director reinstated an applicant for new facilities untimely filing its hearing fee.[1]

7. Therefore, we conclude that Mr. White's lack of awareness concerning the hearing fee deadline does not constitute sufficient grounds upon which to grant a waiver of the fee requirements.

8. Accordingly, IT IS ORDERED, That the Application for Review filed by JOHN H. WHITE, on March 3, 1992, IS DENIED.

[1] Our rules delegate to the Managing Director the authority to act on requests for waiver of the rules governing fees payments. *See* 47 C.F.R. § 0.231(c). As Mr. White's application for review points out, the Review Board has reinstated an applicant filing a late hearing fee payment under circumstances similar to those underlying our action in *St. Croix*. *See John Spencer Robinson*, 3 FCC Rcd 5542 (Rev. Bd. 1990). However, in a subsequent decision, the Review Board recognized that it had erred and that fee matters are solely within the delegated authority of the Managing Director. *See Scott M. Trentadue*, 6 FCC Rcd 6540 (Rev. Bd. 1991).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 2, 1994

US WEST AND EAGLE TELEPHONE FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE SECTION 61.41(c) AAD 94-27

Comment date: April 4, 1994
Reply date: April 19, 1994

On February 2, 1994, US WEST Communications, Inc.(US WEST) and Eagle Telecommunications, Inc./Colorado, d/b/a/ PTI Communications, Inc.(PTI/Eagle), a wholly owned subsidiary of Pacific Telecom, Inc., filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. The parties state that this waiver would allow them to reflect the changes in their study area boundaries that would result from the sale of 43 US WEST exchanges in rural Colorado to PTI/Eagle. PTI/Eagle also seeks a waiver of the price cap rules at Sections 61.41(c) to exempt it from the price cap "all or nothing" rule. The parties state that this transaction is currently pending before the Colorado Public Service Commission.

Parties may file comments on this petition no later than **April 4, 1994**. Replies should be filed by **April 19, 1994**. Comments should reference AAD 94-27. Four(4) copies of each pleading should be sent to Pat Shipley, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20554, and one(1) copy to The International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C. Copies are also available from ITS.

For further information contact Pat Shipley at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY — File No. W-P-C-6858

For Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to construct, operate, own, and maintain facilities to test a new technology for use in providing video dialtone service in a specific area in Connecticut.

ORDER AND AUTHORIZATION

Adopted: October 14, 1993; Released: November 12, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application of Southern New England Telephone Company ("SNET") filed pursuant to Section 214 of the Communications Act of 1934, as amended,[1] Section 63.01 and Section 63.54 of the Commission's rules, as amended by the Commission's *Second Report and Order*.[2] SNET's application seeks authority to conduct a video dialtone technology and marketing trial in its West Hartford, Connecticut service area. In response to SNET's application, the National Association of Broadcasters ("NAB") and Cablevision Systems Corporation ("Cablevision") filed comments. SNET filed a reply to these comments.

2. For the reasons set forth herein, we grant the application of SNET, subject to certain requirements.

II. BACKGROUND

Application

3. In the *Second Report and Order*, the Commission determined that, through video dialtone,[3] local telephone companies could participate in the video marketplace, consistent with the statutory telephone company-cable television cross-ownership restrictions.[4] The Commission also determined that a Section 214 application is the proper procedural vehicle for proposing video dialtone services.[5] The Commission has approved two applications for video dialtone trials.[6] In addition, the Commission has sought and received, additional information concerning two applications for video dialtone service.[7]

4. In its application, SNET seeks authority to conduct a trial for a period of one year to test the technology and the market for video dialtone service.[8] SNET states that in addition to delivering multichannel and single channel video programming, the network will be capable of delivering to subscribers, on-demand, movies and other advanced interactive services, such as home shopping, educational, and health care services.[9] SNET states that it will also test certain enhanced and non-common carrier services, *i.e.*, digitizing, compressing, and storing video programming, and the provision of video customer premise equipment (CPE).[10]

5. SNET's proposed network architecture consists of fiber to the node[11] with coaxial cables used for the final link

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[1] 47 U.S.C. § 214.

[2] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation To Congress, And Second Further Notice Of Proposed Rulemaking, 7 FCC Rcd 5781 (1992) (*Second Report and Order), pets. for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company et al. v. FCC*, No. 92-1404 *et al.*, (D.C. Cir. Sept. 9, 1992).

[3] "Video dialtone" is defined as the provision by a local telephone company of a basic common carrier platform to multiple video programmers on a nondiscriminatory basis. A "basic platform" is a common carriage transmission service coupled with the means by which customers (end users) can access any or all video programming. If a local telephone company provides such a basic platform, it is permitted to provide enhanced and non-common carrier services related to the provision of video programming in addition to basic common carrier services. *Second Report and Order*, 7 FCC Rcd at 5783.

[4] In a lawsuit brought by subsidiaries of Bell Atlantic Corporation, the U.S. District Court for the Eastern District of Virginia recently declared unconstitutional the statutory telephone company/cable television cross-ownership restriction codified at 47 U.S.C. § 533(b). *C & P Telephone, et al. vs. U.S.*, No. 92-1751-A, 1993 U.S. Dist. Court, (E.D. Vir. August 24, 1993). The court later clarified that its injunction is limited to Bell Atlantic and its subsidiaries, and it denied the motion for intervention filed by U S West and other telephone companies. Thus, there is nothing in District Court's decision to preclude us from taking action herein.

[5] *Id.* at 5820. Generally, Section 214 requires Commission authorization before a carrier extends a new interstate line of communication. A "line" includes any channel of communication established by appropriate equipment. 47 U.S.C. § 214(a).

[6] *C&P of Virginia*, 8 FCC Rcd 2313 (released March 25, 1993); *New York Telephone*, 8 FCC Rcd 4325 (released June 29, 1993).

[7] *New Jersey Bell Telephone Company*, FCC 93-367, released July 28, 1993.

[8] SNET Application at 2, 4. SNET states that it will test numerous technological and marketing aspects of video dialtone service, including video transmission over a fiber optic-coaxial cable network; operation of the video switch; access via menu to on-demand video services; consumer interest in video-on-demand services; consumer and programmer willingness to pay for video-on-demand services; and the actual cost of installing and operating a video-on-demand service.

[9] *Id.* at 4.

[10] *Id.* The video CPE, *i.e.*, converter box and inside wiring, will be provided by SNET Diversified Group, Inc. and possibly third parties. In addition, SNET states that information services may be provided by third parties as well as affiliates of SNET.

[11] The network topology consists of multiple fiber-optic feeder sections, each section interconnecting the central office to a distinct fiber node. A fiber node serves an area that encompasses approximately five hundred customers.

to the home, and associated signal processing equipment.[12] SNET states that it will transport video programming to potentially 1,600 subscribers.[13] According to SNET, the video programming for the trial will be provided by multiple, unaffiliated programmer-customers.[14] The programming for on-demand video services, according to SNET, will be digitized, compressed and stored in a video storage server, and then selected by subscribers for viewing.[15] SNET states that the programmer-customers will be solely responsible for the selection, charging and control of video programming provided to the subscribers.[16]

6. SNET states that "[t]he proposed network will provide approximately 100 channels of video dialtone capacity during the initial stages of construction and testing, and ultimately will be capable of providing several hundred channels of capacity."[17] SNET further states that the proposed network will expand as demand increases so as not to become a bottleneck.[18]

7. SNET states that the investment and expenses associated with the facilities for the trial will be accounted for in accordance with Part 32 and Part 64 of the Commission's rules.[19] To ensure that no costs associated with the construction, operation or use of video dialtone service will appear in SNET's rate base or as a regulated expense without the prior authorization of the Commission, SNET states that it will separately account for the direct incremental investments and expenses it incurs to conduct the trial.[20] SNET filed an illustrative tariff with its application containing the proposed tariff charges and regulations for the services to be offered.[21] SNET estimates the total trial costs to be $2,740,000.[22]

Comments

8. NAB states that it does not oppose SNET's application;[23] however, NAB does seek clarification of several aspects of SNET's application. First, NAB requests an explanation for the differences in per subscriber charges for video programmers accessing the platform through the broadcast connection and the video-on-demand connection.[24] Second, NAB states that SNET, or the Commission, should establish a policy preventing a single programmer from purchasing more than 50 percent of the system's channel capacity.[25] Finally, NAB states that SNET's application lacks specificity as to the architecture of the system and the equipment that will be used.[26]

9. Cablevision also does not oppose SNET's application;[27] however, Cablevision is concerned that the widespread deployment of video dialtone service by SNET will exacerbate the regulatory disparity embodied in Connecticut law, which bars non-local exchange carriers such as Cablevision from competing in the provision of intraexchange telecommunications services.[28] According to Cablevision, the Commission should, at a minimum, impose rigorous accounting and cost allocation safeguards to protect competition and consumers before approving the proposed trial in order to reduce the opportunities for SNET to exploit that regulatory disparity by using its monopoly ratebase to subsidize its video dialtone service.[29]

10. In its reply, SNET argues that NAB's comparison of SNET's proposed "per subscriber" charge for broadcast connection with its "per subscriber" charge for video-on-demand connection is inaccurate. SNET notes that NAB does not take into consideration the additional charges that end users and programmers of video-on-demand services would have to pay, such as the subscriber (end user) video-on-demand monthly charge of $6.00 and the nonregulated service charges associated with the provision of video-on-demand that are incurred by programmer-customers.[30] According to SNET, the video-on-demand per subscriber charge of $6.00/month, together with the video-on-demand connection charges assessed to video programmers, would support the costs of video-on-demand

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[12] *Id.* at 3. SNET plans a completely separate overbuild from its telephone exchange network for the provision of video dialtone service. The components of its video dialtone network include: 1) a video server that stores digitally encoded program material; 2) a video switch that provides the basic connectivity between the various sources of program material and subscribers; 3) RF modulators/optics that accept digitally encoded video signals or baseband video signals and convert them to an optical signal; 4) a fiber/coaxial cable network; and 5) converters that perform the necessary channel selection and digital decoding functions. *See* SNET Application, Exhibit 2.

[13] *Id.* at 2. SNET states that video dialtone service will be offered to 200 customers initially, and after "successful" start-up of the network, the service will be offered to all 1,600 homes. SNET assumes that 60% or 960 homes may ultimately subscribe. SNET Application, Exhibit 3.

[14] *Id.*

[15] *Id.* at 5. SNET states that it will provide enhanced and non-common carrier services related to the video programming, *i.e.*, digitizing, compressing and storing the video programming in a video storage server, during the trial. SNET states that these enhanced and non-common carrier services may also be provided by third parties.

[16] *Id.* at 7. SNET states that unless and until the current restrictions that bar telephone companies from providing programming directly to subscribers in their service areas are removed, SNET will not provide any of the video programming transported over its proposed network to subscribers, either directly or through an affiliate, nor will it have any role in the selection or packaging of the programming.

[17] *Id.* at 3-4. In its Illustrative Tariff, SNET states that it reserves the right to limit the number of channels one programmer-customer may purchase to ensure that one programmer-customer does not purchase the entire capacity. SNET Application, Illustrative Tariff at 15.

[18] *Id.* at 4, note 4.

[19] *Id.* at 6.

[20] *Id.*

[21] SNET states that the tariff filed with the Commission will seek to charge up to the level of charges set forth in the Illustrative Tariff in order to test the willingness of subscribers and programmer-customers to pay for the video dialtone service. SNET Application at 6.

[22] SNET Application, Exhibit 3. According to SNET, its estimated costs include the costs associated with start-up, labor and materials, and operation.

[23] Indeed, NAB believes that video dialtone trials such as this are beneficial to the development of new technologies and furthering of competition to cable systems. NAB Comments at 2.

[24] NAB Comments at 3. According to NAB, broadcast connection users would pay 20 to 25 percent more "per subscriber" than those using the video-on-demand connection. NAB states that the "per arrangement" charges are the same for broadcast and video-on-demand connections, and therefore, there appears to be no valid reason for the higher "per subscriber" rates for broadcast connection.

[25] *Id.* at 3-4.

[26] *Id.* at 4.

[27] Cablevision Comments at 2.

[28] *Id.*

[29] *Id.* at 4.

[30] SNET Reply at 3-4.

capabilities.[31] As to NAB's request that SNET, or the Commission, establish a policy preventing a single programmer from purchasing more than 50 percent of the system's channel capacity, SNET states that its trial is for only one year and that flexibility is required to test technologies, facilities, programmer utilities and consumer response.[32]

11. In response to NAB's concern that SNET's application lacks specificity, SNET states that it has not yet selected the exact video dialtone system parameters for its trial,[33] but that it plans to use a fiber-to-the-node architecture with coaxial facilities from the node to individual subscribers.[34] Furthermore, according to SNET, the system will be designed to provide 110 channels of video programming initially, with possible expansion to approximately 500 channels using digital compression.[35] SNET states that it plans a gradual roll-out of the trial and any increase in channel capacity will be driven by consumer demand and the availability of related technology and facilities.[36] In response to Cablevision's request that the Commission consider Connecticut's statutory and regulatory prohibition on intraexchange competition by non-local exchange carriers as part of its review of SNET's video dialtone application, SNET states that these concerns are more properly addressed to the relevant Connecticut authorities, not to this Commission.[37]

III. DISCUSSION

12. We conclude that the public interest, convenience and necessity is served by granting Section 214 authority to SNET for the provision of a video dialtone technology and marketing trial in its West Hartford, Connecticut service area. In the *Second Report and Order*, we found that it is in the public interest to encourage market trials of video dialtone technology and services in order to fulfill our goal of promoting an advanced, cost effective telecommunications infrastructure.[38] We have previously granted Section 214 authorization to C&P of Virginia[39] and New York Telephone[40] for technology trials. SNET's application seeks to test the viability of its network architecture and consumer interest in on-demand video dialtone service.[41] We believe that SNET's trial will further the public interest goals identified by the Commission in the *Second Report and Order*[42] through SNET's investment in an advanced fiber-to-the-curb network and through the entry of SNET as a competitive video service provider that could potentially bring additional video services to consumers (end users).

13. Furthermore, we find that SNET's proposal is consistent with the framework developed in the *Second Report and Order* and our subsequent decisions for the provision of video dialtone. This framework requires, as a prerequisite to a local telephone company's participation in the video market place, the provision of a basic, common carrier platform containing sufficient capacity to serve multiple video programmers.[43] The basic common carrier platform must give multiple video programmers nondiscriminatory access to a common carrier transmission service that will enable them to deliver, and consumers to receive, video programming and other information services.[44] We find that SNET will be providing a common carrier platform with sufficient capacity to serve multiple video programmers. The initial capacity of SNET's video dialtone platform will accommodate 110 channels of video programming. There is no evidence that this capacity is inadequate. We find that the availability of 110 channels of capacity, under the circumstances of this limited trial, should be adequate, initially, to serve multiple video programmers.[45] In addition, SNET has stated that it will expand the initial capacity of the platform if necessary to meet increased demand. While SNET has represented that the capacity of the platform could possibly expand to approximately 500 channels using digital compression, it has not set forth a schedule for this possible expansion. Since it is not clear that it would be feasible from a technical standpoint for SNET to take such action within the one year trial period, we do not rely on this representation in

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[31] *Id.* SNET states that the "per arrangement" charges are the same for broadcast connection and video on-demand connection because these charges are designed to recover the administrative and technical support costs to arrange for the connection.

[32] *Id.* at 4.

[33] *Id.* at 6.

[34] *Id.* SNET states that each node will serve 400-500 subscribers.

[35] *Id.* SNET states that due to the rapidly evolving nature of video dialtone technologies, the exact system parameters have not been selected; however, SNET hopes to finalize its network architecture soon and select the vendors for the trial.

[36] *Id.* at 5. SNET states that it will meet its regulatory obligation to offer its video dialtone platform on a non-discriminatory, common carrier basis.

[37] *Id.* at 7.

[38] *Second Report and Order*, 7 FCC Rcd at 5836.

[39] *See* note 6, *supra*. In *C&P*, we found that a technical trial using Asynchronous Digital Subscriber Line (ADSL) technology to deliver video programming over copper loop facilities was in the public interest.

[40] *See* note 6, *supra*. In *NYT*, we found that a technical trial using a fiber/coax network was in the public interest.

[41] *See* note 8, *supra*.

[42] These public interest goals include: 1) investment in an advanced telecommunications infrastructure; 2) competition in the provision of video services; and 3) additional opportunities for consumer choice through a diversity of video services. *Second Report and Order*, 7 FCC Rcd 5787.

[43] 47 C.F.R. § 63.54(d)(2); *Second Report and Order*, 7 FCC Rcd at 5789. By providing this basic common carrier platform, local telephone companies are permitted to exceed the "carrier-user relationship" with video programmers that are customers of, interconnect with, or share the construction or operation of, the basic common carrier platform. A local telephone company may not, however, determine how video programming is presented for sale to consumers, including making decisions concerning bundling, tiering or the price, terms, and conditions of video programming offered to consumers.

[44] *Id.* We determined in the *Second Report and Order* that pursuant to Section 201(a) of the Communications Act, 47 C.F.R. § 201(a), a local telephone company offering a video dialtone platform must furnish capacity to video programmers upon reasonable request, and that pursuant to Section 202(a), 47 C.F.R. § 202(a), such capacity must be provided without unreasonable discrimination. *Second Report and Order*, 7 FCC Rcd at 5798, note 69.

[45] We note that no video programmers have requested access to SNET's video dialtone platform as of the date of SNET's application.

approving this application.[46] Nevertheless, we expect that the capacity of the platform will be sufficient to meet demand during this one year trial, and if demand exceeds capacity, the "proposed network will expand as demand increases so as not be become a bottleneck."[47]

14. With respect to allocation of capacity, we note that non-discriminatory access to the platform by multiple programmers is a fundamental characteristic of video dialtone, and, for this reason, we are very interested in whether the capacity SNET proposes for its trial is sufficient to accommodate multiple video programmers on a common carrier basis as required by our video dialtone policies.[48] Accordingly, we will require SNET to report, six months after commencement of the trial and at the end of the trial, on: 1) the amount of capacity assigned to each video programmer; and 2) the implementation of digital technology and its impact on available capacity.[49] In addition, we will require SNET to report to us within 5 days of denying any video programmer access to the platform due to capacity limitations, in whole or in part; specifically, SNET must report on the steps taken to expand the platform's capacity to accommodate demand for additional capacity.[50]

15. We also find that SNET has committed to providing video programmers nondiscriminatory access to the platform. According to SNET, each programmer-customer will be able to offer multichannel and single channel broadcast service as well as on-demand video services to end users. In addition, the terms and conditions for access to the platform will be governed by an appropriate tariff. We also find that the variation in SNET's proposed broadcast and video-on-demand connection charges, set forth in its illustrative tariff, does not warrant withholding grant of the Section 214 application. Any issue regarding the lawfulness of SNET's rate structure, including whether it is unlawfully discriminatory, will be decided in the tariff review process upon SNET's filing of a tariff, at which time interested parties, including NAB, may submit comments. We need not resolve these issues now, however, in the context of an illustrative tariff for a proposed video dialtone trial.

16. We also find that SNET will not be involved, impermissibly, in the presentation of video programming to subscribers. In the *Second Report and Order*, we stated that local telephone companies may not determine how video programming is presented for sale to consumers, including making decisions concerning bundling, tiering, or the price, terms, and conditions of video programming to consumers.[51] According to SNET, programmer-customers will be solely responsible for the selection, charging and control of video programming provided to subscribers.[52]

17. We further find that SNET's provision of non-common carrier and enhanced services, and providing video customer premises equipment, is consistent with requirements for the provision of these services as provided for in Section 63.54(d)(2) of our rules, 47 C.F.R. § 63.54(d)(2).[53] SNET also states that it may provide "other programming services." In the *Second Report and Order*, we recognized that Congress distinguished between "video programming" and "other programming services" in elaborating on what constitutes "cable service."[54] Recognizing this point, we determined that local telephone companies could provide non-video programing services.[55] Therefore, we find that SNET can, consistent with the telephone company-cable television cross-ownership rules and our video dialtone rules, provide non-video programming services.

18. Consistent with the approach taken in *C&P* and *New York Telephone*, we find that SNET's proposed assignment of costs related to the provision of the basic platform is appropriate for purposes of this trial. To ensure that these costs are not borne by ratepayers of other regulated services, we require SNET to segregate all costs incurred in providing the basic platform into subsidiary accounting records and to assign these costs to the video dialtone trial.[56] Our decision here does not finally establish the method for tracking and assigning costs to video dialtone.

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[46] We recognize that the amount of capacity available is dependent upon the technology incorporated into the network. The initial video dialtone applications have indicated that the implementation of digital technology into the network will significantly expand the capacity that is available to video programmers. We also recognize that there may only be a limited demand for capacity by video programmers during this initial stage of video dialtone development. Therefore, we will review each application on a case-by-case basis, taking into consideration the initial capacity available, the ability to expand this capacity, the demand for capacity, and the duration of the offering, before making any decision on whether the applicant meets the requirement of providing a basic common carrier platform with sufficient capacity to service multiple video programmers. In the context of SNET's application, we find that SNET will be providing sufficient capacity to serve multiple video programmers based upon its initial capacity, ability to expand this capacity, the demand for capacity and the duration of the trial.

[47] SNET Application at 4, n.4.

[48] We do not agree with SNET's proposal that it have complete flexibility to allocate capacity to programmers merely because this is a trial.

[49] SNET has filed an illustrative tariff as part of its Section 214 application. The illustrative tariff states that SNET reserves the right to limit the number of channels purchased to ensure that one programmer-customer does not acquire the entire capacity of the platform. We need not determine, on the record before us, whether this tariff provision would be reasonable. We remind SNET, however, that the *Second Report and Order* requires local telephone companies offering video dialtone service to provide a common carrier platform containing sufficient capacity to serve multiple video programmers. *Second Report and Order*, 7 FCC Rcd at 5797.

[50] We expect applicants proposing a tariffed video dialtone service to describe with greater specificity how their proposed construction and operation of the basic platform will expand as demand increases.

[51] *Second Report and Order*, 7 FCC Rcd at 5797-98.

[52] SNET Application at 7.

[53] Local telephone companies may exceed the carrier-user relationship only with video programmers that are customers of, interconnect with, or share the construction or operation of the basic platform. *Second Report and Order*, 7 FCC Rcd at 5798.

[54] *Second Report and Order*, 7 FCC Rcd at 5822; *citing* 47 U.S.C. § 522(11). Examples of non-video programming services identified in the *Second Report and Order* include one-way videotext such as news services and stock market information, one-way transmission of video games and computer software, and on-line airline guides.

[55] *Id.*

[56] SNET must account for all costs associated with the trial, including development costs and expenses, in accordance with Part 32 and Part 64 of the Commission's rules.

In the event these costs are not recovered from future video dialtone services, they must be borne by shareholders rather than the ratepayers of other regulated services.

19. SNET states that it will account for the costs of providing enhanced and non-common carrier services in accordance with Part 64 of the Commission's rules. We find that, to the extent the nonregulated components of the video dialtone trial are not already covered by SNET's cost allocation manual (CAM), SNET must revise its manual to show the procedures it intends to use to allocate the costs between regulated and nonregulated activities for the duration of the trial.[57] At a minimum, we require SNET to provide a list of all accounts affected by its provision of nonregulated services during the trial, and also provide a description of those services. Until these revisions are filed with the Commission, SNET cannot begin to offer enhanced and non-common carrier services. These temporary revisions will be subject to public comment and Commission scrutiny. SNET will have to file permanent revisions if and when it decides, and is authorized, to offer video dialtone services generally. We emphasize that our decision on any temporary revision to SNET's CAM will not finally resolve any accounting issue related to video dialtone services. We believe that the accounting conditions we are imposing upon SNET's video dialtone service trial adequately address the concerns of Cablevision.

IV. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the application of Southern New England Telephone Company (File No. WPC-6858) IS GRANTED, and the applicant is authorized to provide a video dialtone trial in its West Hartford, Connecticut service area for a period of one year commencing within one year of the release of this order.

21. IT IS FURTHER ORDERED, that grant of this application IS SUBJECT TO the following conditions:

a) That no costs associated with the construction, operation or use of the video dialtone trial shall appear in any SNET rate base or as a regulated expense without prior authorization from this Commission.

b) That SNET shall file any necessary revisions to its Cost Allocation Manual (CAM) prior to providing any enhanced and non-common carrier services.

c) That SNET must not involve itself in decisions concerning the presentation of video programming to end users absent prior Commission approval, and specifically, must allow video programmers participating in the trial to decide whether they will charge for video programming offered to end users. SNET must not discriminate against video programmers based upon their decision to charge or not to charge for programming offered during the trial.

d) That SNET shall report to the Chief, Domestic Services Branch, Common Carrier Bureau, within 5 days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, on the steps taken to expand the capacity of the platform to accommodate demand.

d) That SNET submit to the Chief, Domestic Services Branch, Common Carrier Bureau, six months after commencement of the trial and at the end of the one year trial period, a written report. The reports shall, among other things,

1) include a statement from each video programmer or other service provider using SNET's services whether that programmer/service provider believes it has been discriminated against by SNET in any manner. In addition, SNET shall provide a statement from each programmer/service provider, or from SNET, identifying each programmer/service provider that inquired about obtaining access to SNET's platform, and did not obtain access, and why it did not;

2) identify the capacity allocated to each video programmer-customer and the identity of the programmer-customer;

3) describe the video dialtone technology used during the trial. SNET shall include information on the video switch and other components of the video dialtone system, the operation of video-on-demand, the methods of accessing the platform, and the digital technology incorporated into the network and its impact on capacity;

4) evaluate the market for video dialtone service, including consumer interest in on-demand video services and consumer willingness to pay for service;

5) detail the costs SNET has allocated to the trial, broken down into subsidiary accounting records;

6) include any published commentary of which SNET is aware regarding the trial.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[57] *See* Section 64.903 of the Commission's rules, 47 C.F.R. § 64.903.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-COMPUTE CORPORATION, File No. ENF-92-04

Apparent Liability for Forfeiture

ORDER

Adopted: February 9, 1994; Released: March 2, 1994

By the Commission:

1. On September 17, 1992, the Commission issued a Notice of Apparent Liability (NAL) for a forfeiture in the amount of $400,000 against Tele-Compute Corporation (Tele-Compute) for apparent violations of Section 223(b) of the Communications Act of 1934 (as amended), 47 U.S.C. § 223(b).[1] By this Order, and under the authority of Section 504(b) of the Act, 47 U.S.C. § 504(b),[2] this Commission remits the forfeiture assessed against Tele-Compute.

2. The NAL was issued following an investigation by the Common Carrier Bureau's Enforcement Division (the Bureau), the results of which indicated that Tele-Compute had apparently transmitted obscene and indecent messages via the telephone network in violation of Section 223(b) of the Act.3).[3] On September 25, 1992, Tele-Compute filed a response to the NAL ("Response") in which it stated that it was not the provider of the messages identified in the NAL, nor was it in the business of providing any message services over the telephone. Tele-Compute stated that it operates as a "service bureau"--an independent company that offers voice-storage and other call-processing equipment to other companies for their use in providing various information services. Tele-Compute explained that the telephone lines over which the messages under investigation had been placed had been ordered by Tele-Compute on behalf of West Penn Audio (West Penn), an information provider operating in the state of Pennsylvania.[4] Tele-Compute claimed that its only relationship with West Penn was an arms-length business one.[5] Tele-Compute requested that the Commission withdraw the NAL because it neither had transmitted the objectionable messages nor was responsible for their content.

3. Based on the information provided by Tele-Compute in response to the NAL, we find good cause to remit the forfeiture assessed against Tele-Compute and terminate this enforcement action. It is clear that Tele-Compute did not transmit, via the telephone network, any of the messages that we determined to be obscene and indecent in the NAL.[6]

4. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 504(b) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 504(b), that the $400,000 forfeiture assessed against Tele-Compute IS REMITTED, and the above-captioned proceeding against Tele-Compute IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] *Tele-Compute Corp.*, Notice of Apparent Liability, 7 FCC Rcd 6041 (1992).

[2] Section 504(b) states in pertinent part:

> The forfeitures imposed by title II . . . of this Act shall be subject to remission or mitigation by the Commission, under such regulations and methods of ascertaining the facts as may seem to it advisable . . . .

[3] Section 223(b) states in part:

(1) Whoever knowingly --

> (A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined in accordance with Title 18, United States Code, or imprisoned not more than two years, or both.

(2) Whoever knowingly --

> (A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

[4] The Bureau subsequently initiated an investigation of West Penn and its role with respect to the messages at issue. The Bureau and West Penn have entered into a Consent Decree which requires West Penn to (1) cease engaging in activity that would violate Section 223(b), (2) report any activity in the information provision business for the next five years, and (3) pay a voluntary contribution of $5,000 to the U.S. Government. The Bureau, in turn, terminated enforcement proceedings against West Penn with respect to the messages. *West Penn Audio, Inc.*, 8 FCC Rcd 4760 (Com. Car. Bur. 1993).

[5] Response at 2.

[6] *See supra*, para. 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Inner City Broadcasting Corporation — File No. 60447-CM-MP-91

For Additional Time to Construct MMDS station WLW749 at Savannah, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1994; Released: March 2, 1994

By the Chief, Domestic Facilities Division:

1. *Background.* On April 5, 1990, Inner City Broadcasting Corporation (City) was granted a conditional license to construct and operate the above-referenced Multichannel Multipoint Distribution Service (MMDS) station (File No. 6077-CM-P-83). An express condition of this conditional license stipulated that construction of the station must be completed on or before April 5, 1991. On March 18, 1991, City filed the above-referenced Application for Additional Time to Construct a Radio Station, FCC Form 701, stating that "[a]ppropriate entry in both a new geographic area *and* a new service has presented unanticipated business, financial and engineering challenges" but that City had expended funds to renew the lease option agreement for its transmitter site. City's Application at Exhibit No. 1.

2. *Petition to Deny.* Blake Twedt (Twedt) file a petition to deny City's extension application, arguing that "City's request for additional time is nothing more than a transparent ploy to further warehouse the spectrum and should be denied...." Twedt's Petition at 1. Twedt states that, although he is ready, willing and able to construct a cochannel MMDS station at Savannah, "his ability to do so is being frustrated by ... City's extension request." *Id.* It is also argued that City has failed, as required by Section 21.40(b), to: (1) file a verified statement; and (2) make diligent efforts to construct the facility; and (3) demonstrate that an extension is necessary due to circumstances beyond its control; or (4) demonstrate that an extension is necessary due to unique and overriding public interest concerns that would justify an extension of time to construct. According to Twedt, "City's payment of minimal tower reservation fees falls far short of the diligent efforts required by Section 21.40(b)." *Id.* at 2.

> One would think that eight years is more than sufficient time for Inner City to have become acquainted with both the service and the market. Indeed, at bottom, Inner City is merely saying it has made an independent business decision not to move ahead with its Savannah MMDS facility at this time. Yet, it is axiomatic that "[i]ndependent business judgments are within the applicants control, and thus have not been treated in the past as a basis for extending construction time." *See, e.g. Revision of Part 21 of The Commission's Rules,* FCC 86-154, CC Docket No. 86-128, at 9, n.28 (rel. April 11, 1986); *San Miguel Cable Systems, Inc.,* Mimeo 3525, File No. 50164-CM-MP-85 (rel. April 2, 1986). ... Clearly, Inner City would like an indefinite opportunity to warehouse this spectrum.

Id. at 3. City filed no opposition to the petition to deny.

3. *Discussion.* We agree with Twedt that City failed to make the demonstrations required by Section 21.40(b) in its extension application. Section 21.40(b) clearly requires that each extension application must show that the applicant "has made diligent efforts to construct the facility." Although City has demonstrated that construction delay is not caused by lack of site availability, which would bar a grant of its extension application by the terms of Section 21.40(b), its site availability demonstration is insufficient to show that it made efforts *to construct* its MMDS station. This due diligence showing is a significant requirement.

4. Section 21.40(b) of the Commission's Rules, 47 C.F.R. Sec. 21.40(b), provides, *inter alia*,:

> ... Applications for extension... must include a verified statement from the applicant showing that the licensee has made diligent efforts to construct the facilities and (i) that additional time is required due to circumstance beyond the applicant's control, in which case the applicant must describe such circumstances and must set forth with specificity and justify the precise extension period requested....

See Revision of Part 21 of the Commission's Rules, 2 FCC Rcd 5713, 5721-22 (1987). Here, City has not provided a sufficient demonstration of diligent efforts to construct, as required by Section 21.40(b). As early as 1986, the Commission described such lack of action as the warehousing of frequencies.

> Our present authorization process is based upon the assumption that each applicant in fact intends to and will construct facilities. Our experience in some of the Part 21 services, however, suggests that this may not always be the case. Some applicants seek construction permits for the purpose of subsequently assigning or transferring them for profit, while other permittees delay construction of facilities in order to secure customers or acceptable financial terms, or until such time as they feel the economic climate best suits their enterprise. Currently, there is no substantial economic penalty for holding an authorization without constructing. Warehousing authorizations is not in the public interest. The public is best served when new services are brought on line as rapidly as possible. A carrier who is warehousing permits is preventing all other uses of that spectrum, resulting in that spectrum lying fallow. The proposed rules would attempt to prevent these practices....

Notice of Proposed Rulemaking, id., 104 FCC 2d 116, 122-23 (1986).

5. In addition, the extension application is silent as to what, if any, circumstances were beyond its control that prevented City from initiating construction. While the private interests of City are implicit in the extension application, no explanation is provided as to the manner in which the public would benefit from City's delay. We also note

that City has presented in its extension application no unusual circumstances not faced by other MDS conditional licensees. The Commission has specifically stated that "[w]e do not intend to grant extensions of time except under unusual circumstances." *Id.* at 125. Thus, City has failed to justify an extension of time to construct.

6. *Conclusion.* Having carefully considered the pleading submitted and extension application filed, IT IS ORDERED that the petition to deny filed by Blake Twedt IS GRANTED and the above-referenced extension application of Inner City Broadcasting Corporation IS DENIED for failure to comply with the requirements of Section 21.40(b). This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4, 1.106 and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-12

In the Matter of

Amendment of Section 73.202(b), RM-8419
Table of Allotments,
FM Broadcast Stations.
(Sebastian, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 1994; Released: March 2, 1994

By the Acting Chief, Allocations Branch:

Comment Date: April 25, 1994
Reply Comment Date: May 10, 1994

1. The Commission has before it the petition for rule making filed by T & M Communications ("petitioner"), proposing the allotment of Channel 240C3 to Sebastian, Florida, as that community's first local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 240C3 to Sebastian, Florida, since it could provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 240C3 can be allotted to Sebastian in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] We note that the proposed transmitter is located within 80 kilometers of the Federal Communications Commission's monitoring station at Vero Beach, Florida. Therefore, petitioner should refer to the provisions of Section 73.1030(c)(1)-(5) of the Rules governing protection of Federal Communications Commission Monitoring Stations.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Sebastian, Florida	–	240C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 25, 1994**, and reply comments on or before **May 10, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper
Meyer, Faller, Weisman & Rosenberg
4400 Jenifer Street, N.W., Suite 380
Washington, D.C. 20015
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240C3 at Sebastian are North Latitude 27-49-00 and West Longitude 80-28-12.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-13

In the Matter of

Amendment of Section 73.202(b), RM-8431
Table of Allotments,
FM Broadcast Stations.
(Agana, Guam)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 1994; Released: March 2, 1994

By the Acting Chief, Allocations Branch:

Comment Date: April 25, 1994
Reply Comment Date: May 10, 1994

1. The Commission has before it the petition for rule making filed by Inter-Island Communications, Inc. ("petitioner"), seeking the allotment of Channel 275C to Agana, Guam, as that community's sixth local FM aural transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 275C to Agana, Guam, as that community's sixth local FM aural transmission service. An engineering analysis has determined that Channel 275C can be allotted to Agana, Guam, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Agana, Guam	230C2, 238C2, 248C2, 262C2, 270C2	230C2, 238C2, 248C2, 262C2, 270C2, 275C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 25, 1994**, and reply comments on or before **May 10, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Gutmann
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 275C at Agana, Guam, are North Latitude 13-28-27 and West Longitude 144-44-52.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-14

In the Matter of

Amendment of Section 73.202(b), RM-8426
Table of Allotments,
FM Broadcast Stations.
(Van Wert, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 1994; Released: March 2, 1994

Comment Date: April 25, 1994
Reply Comment Date: May 10, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Van Wert Radio ("petitioner") requesting the allotment of Channel 282A to Van Wert, Ohio, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 282A to Van Wert since it could provide the community with its first competitive FM service. Channel 282A can be allotted to Van Wert in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.5 kilometers (7.7 miles) east to avoid a short-spacing to Station WLBC-FM, Channel 281B, Muncie, Indiana.[1] This site restriction does not permit compliance with the minimum distance separation requirements with respect to the allotment coordinates for Channel 282A at Richwood, Ohio. However, the Van Wert reference coordinates do comply with the mileage separation requirements with respect to the construction permit (BPH-920113MC) which has been granted for a new station on Channel 282A at Richwood. Therefore, we will propose the allotment but final licensing of a station on the Van Wert channel, if allotted, may be delayed pending the issuance of a license for Channel 282A at Richwood. Canadian concurrence in the allotment at Van Wert is required since the community is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Van Wert, Ohio	255B	255B, 282A

[1] The coordinates for Channel 282A at Van Wert are North Latitude 40-53-09 and West Longitude 84-26-17.

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 25, 1994**, and reply comments on or before **May 10, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerrold Miller, Esq.
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-15

In the Matter of

Amendment of Section 73.202(b) RM-8411
Table of Allotments,
FM Broadcast Stations.
(Ravenswood and Elizabeth,
West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 1994; Released: March 2, 1994

Comment Date: April 25, 1994
Reply Comment Date: May 10, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by MediaCom, Inc. ("petitioner"), licensee of Station WRZZ(FM), Channel 291A, Ravenswood, West Virginia, proposing the reallotment of Channel 291A from Ravenswood to Elizabeth, West Virginia, and the modification of Station WRZZ(FM)'s license to specify Elizabeth, West Virginia, as its community of license. Petitioner states its intention to apply for Channel 291A at Elizabeth, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. *See Modification of FM License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990). Petitioner states that the requested reallotment to Elizabeth is mutually exclusive with the existing allotment of Channel 291A at Ravenswood, West Virginia. Petitioner also states that the change of community is necessary because from its present tower location it is unable to properly serve Ravenswood within its 70 dBu contour. Petitioner claims that this is due to multi-path signal distortions caused by winding river valley and hills along the sides of the river which adversely affect the city grade signal. Petitioner maintains that the city grade signal cannot be improved by relocating the transmitter site because it would cause an encroachment on the protective contours of Station WAEZ(FM), Channel 292A, Milton, West Virginia. Moreover, petitioner claims that the reallotment of Channel 291A from Ravenswood (population 4,189)[1] to Elizabeth (population 900) would provide Elizabeth with its first local aural transmission service and would not deprive Ravenswood of its sole local aural transmission service.[2]

3. We believe the public interest would be served by proposing the reallotment of Channel 291A from Ravenswood to Elizabeth, West Virginia, since it could provide the community with its first local aural transmission service and would eliminate Station WRZZ(FM)'s terrain shielding problem. An engineering analysis has determined that Channel 291A can be allotted to Elizabeth in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3] Since Elizabeth is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been requested.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ravenswood, West Virginia	226A, 291A	226A
Elizabeth, West Virginia	--	291A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 25, 1994**, and reply comments on or before **May 10, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert L. Olender, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Ave., N.W., Suite 300
Washington, D.C. 20015-2003
(Counsel for Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the*

[1] Population figures taken from the 1990 U.S. Census.
[2] Ravenswood is served by Station WMOV(AM). In addition, a construction permit has been issued for Station WFYZ(FM), Channel 226A at Ravenswood.
[3] The coordinates for Channel 291A at Elizabeth are North Latitude 39-03-48 and West Longitude 81-23-43.

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-16

In the Matter of

Amendment of Section 73.202(b), RM-8432
Table of Allotments,
FM Broadcast Stations.
(Belle Fourche, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 1994; Released: March 2, 1994

Comment Date: April 25, 1994
Reply Comment Date: May 10, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ultimate Caps, Inc. ("petitioner"), requesting the allotment of Channel 271C3 to Belle Fourche, South Dakota, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 271C3 to Belle Fourche since an interest has been expressed in providing the community with an additional local FM transmission service. Channel 271C3 can be allotted to Belle Fourche in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Belle Fourche, South Dakota	240C1	240C1, 271C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 25, 1994**, and reply comments on or before **May 10, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Karl Grimmelmann, Vice President
Ultimate Caps, Inc.
P.O. Box 787
Belle Fourche, South Dakota 57717
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 271C3 at Belle Fourche are North Latitude 44-40-18 and West Longitude 103-51-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC GATEWAY EXCHANGE, INC. File No. I-T-C-94-007

Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and various international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 10, 1994; Released: March 3, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of the requested services.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-007 IS GRANTED and Pacific Gateway Exchange, Inc. (PGE) is authorized to:

a. lease from Comsat and operate 64-kbps satellite half-circuits, allocated in accordance with Appendix A, between appropriately-licensed earth stations in the United States and appropriate Atlantic Ocean Region (AOR) INTELSAT satellites, connecting with similar circuits between the satellites and an earth station in each of the points listed in Appendix A furnished by PGE's correspondent in that point;

b. lease and operate 64-kbps circuits, allocated in accordance with Appendix A, in an appropriately-licensed earth station in the United States;

c. lease and operate appropriate connecting facilities between the earth station in (b) and PGE's operating center in Los Angeles, California; and

d. use said facilities to provide international private line and switched voice services between the United States and those points listed in Appendix A.

3. IT IS FURTHER ORDERED that our authorization of the applicant to provide private lines is limited to the provision of such private lines only between the United States and those points listed in Appendix A -- that is, private lines which originate in the United States and terminate in one of the points listed in Appendix A, or which originate in one of the points listed in Appendix A and terminate in the United States. In addition, the applicant may not -- and the applicant's tariff must state that the applicant's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic communications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling or controlled by the applicant, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling or controlled by the applicant are parties.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

6. IT IS FURTHER ORDERED that the applicant shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit addition reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other autho-

[1] We note that should PGE obtain any interest in facilities beyond the respective points listed in Appendix A for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986), it would be necessary for PGE to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional point and for authority to acquire any facilities needed to provide service to such additional points.

rized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Atlantic Ocean Region Satellite

Country	Initial Circuits Satellite (64-kbps)	Earth Station (64-kbps)	Country	Initial Circuits Satellite (64-kbps)	Earth Station (64-kbps)
Armenia	6	6	Azerbaijan	6	6
Belarus	6	6	Bosnia-Herzegovina	6	6
Croatia	6	6	Estonia	6	6
Georgia	6	6	Kazakhstan	6	6
Kosovo Province	6	6	Kyrgyzstan	6	6
Latvia	6	6	Lithuania	6	6
Moldova	6	6	Russia	30	30
Tajikistan	6	6	Turkmen-istan	6	6
Ukraine	6	6	Uzbekistan	6	6
Yugoslavia (including Montenegro, Serbia and Vojvodina)				6	6

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMSAT CORPORATION File No. I-T-C-94-063

Application for Authority Pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to Provide Inmarsat-C Service in the Indian Ocean Region in the Shore-to-Ship Direction Through a Norwegian Telecom Land Earth Station at Eik, Norway

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 17, 1994; Released: March 3, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by COMSAT Corporation ("COMSAT") of Inmarsat-C mobile satellite services to the Indian Ocean Region ("IOR") in the shore-to-ship direction through a Norwegian Telecom Land Earth Station ("LES") at Eik, Norway.[1]

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-063 IS GRANTED and COMSAT is authorized to:

a. provide Inmarsat Standard C mobile-satellite service in the IOR in the shore-to-ship direction, for maritime mobile-satellite service, aeronautical mobile-satellite service, international land mobile-satellite service, and international land-based temporary fixed-satellite service, subject to the conditions and limitations that apply to these existing COMSAT services; and

b. provide these services via the second generation Inmarsat IOR satellite (with first generation satellites as backup capacity) through Norwegian Telecom's land earth station in Eik, Norway, by routing COMSAT's C-Link shore-to-ship traffic from COMSAT's international telex switch in Southbury, Connecticut via an existing COMSAT cable circuit to Telecom Denmark's Blaavand, Denmark telex switch, connecting with Norwegian Telecom's land earth station through terrestrial facilities provided by Telecom Denmark.[2]

3. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that COMSAT shall file and have in effect a tariff for the services authorized in this order before offering services to the public.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] COMSAT is currently providing Inmarsat-C service to the IOR via the requested facilities on an interim basis, pursuant to a grant of special temporary authority (TAO-2326) from the Commission, effective November 3, 1993.

[2] COMSAT possesses an Indefeasible Right of User interest in the TAT-7 transatlantic cable system. *See Communications Satellite Corp.*, 6 FCC Rcd 5765 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-94-060

Application for authority to acquire and operate facilities for service between the U.S. and Papua New Guinea.

ORDER AND AUTHORIZATION

Adopted: February 17, 1994; Released: March 3, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Papua New Guinea by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-060 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 11 voice-grade satellite circuits between the Yacolt, Washington earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Papua New Guinea furnished by MCI's correspondent in Papua New Guinea;

b. own and operate 11 voice-grade circuits in the Yacolt earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 11 voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California operating center; and

d. use facilities in a, b and c above to provide MCI's regularly authorized services between the U.S. and Papua New Guinea.

3. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Papua New Guinea -- that is, private lines which originate in the United States and terminate in Papua New Guinea or which originate in Papua New Guinea and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Papua New Guinea end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Papua New Guinea affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Repon and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to §203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Guam Telephone Authority — Transmittal Nos. 5 and 6

Tariff F.C.C. No. 1

ORDER

Adopted: January 31, 1994; Released: January 31, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 21, 1993, the Guam Telephone Authority (GTA) filed Transmittal No. 5 with revisions to its Tariff F.C.C. No. 1. This transmittal represents one of several steps that GTA has taken to comply with the requirements of the Commission's 1992 *Show Cause Order*.[1] According to GTA, the rates and regulations it seeks to include in its federal tariff are substantially identical to the terms, conditions, rates and charges by which service is presently provided under GTA's 1974 General Exchange Tariff which was in effect at the time of the *Show Cause Order*. GTA Opposition at 2-3. IT&E Overseas, Inc. (IT&E) and PCI Communications, Inc., filed petitions against GTA Transmittal No. 5. In its subsequent Transmittal No. 6, GTA amended these tariff revisions.[2] GTA Transmittal Nos. 5 and 6 are scheduled to become effective February 1, 1994.

2. In its *Show Cause Order*, the Commission determined that the Territory of Guam and GTA are subject to the Communications Act, that the Commission has exclusive jurisdiction over interstate and foreign common carrier communications originating or terminating on Guam and that GTA had violated Sections 201 and 202 of the Act by a variety of unjust and unreasonable practices. The *Show Cause Order* also directed GTA, during the pendency of that proceeding, to refrain from causing additional harm to interstate and foreign carriers serving Guam, to take certain steps to maintain service to such carriers, and to comply with the Commission's access policies.

3. Thereafter, on April 19, 1993, GTA submitted its "Integrated Compliance Plan and Reply (Integrated Compliance Plan)," indicating that it could not immediately comply with the Commission's access policies but proposing a six-stage process for bringing interconnection and settlement practices on Guam into general compliance with the Commission's access charge policies. One of the steps in this process was the interim GTA tariff which became effective May 18, 1993, and which GTA seeks to revise in accordance with the above transmittals. For the reasons described below, we deny the petitions filed against GTA Transmittal No. 5 and we allow these tariff revisions to become effective as scheduled.

II. PLEADINGS

4. In its petition for rejection, IT&E contends, first, that these revisions violate the *Show Cause Order* because they appear to create an exception to the current GTA requirement that all interexchange carriers receiving any form of trunkside switched access service must compensate GTA on the basis of a percentage of the gross revenues realized from all traffic that utilizes any part of GTA's local exchange network. IT&E Petition at 1-4. Second, IT&E claims the GTA transmittal improperly excludes rates for certain circuits and for some GTA interoffice trunks. *Id.* at 4-5. Third, in light of the crossover ratio established in the Commission's *Strategic Pricing Orders*,[3] IT&E argues that GTA's rates for special access circuits are unreasonably high in relation to GTA's rates for basic voice grade circuits. *Id.* at 5-6. Fourth, IT&E claims that Transmittal No. 5 includes new services and therefore, under Section 61.58(d)(2) of the Commission's Rules, 47 C.F.R. § 61.58(d)(2), GTA should have filed that transmittal on at least 45 days' notice rather than on 41 days' notice. *Id.* at 1.

5. GTA replies to the IT&E petition, first, by explaining that because some customers are not subject to the gross revenue procedure cited by IT&E, the new certification process described in these revisions is needed to identify and correctly bill such customers. Accordingly, GTA contends this new process does not exempt interexchange carriers from the gross revenue procedure. GTA Opposition at 5-6. Second, GTA acknowledges that certain rate information was omitted from its Transmittal No. 5 but asserts such omissions have been corrected. *Id.* at 6-7. Third, GTA argues that application of the crossover ratio established in the *Strategic Pricing Orders* is not appropriate here because that ratio is fundamentally tied to the costs of providing service and, in this case, GTA's access rates are not yet cost based. *Id.* at 7. Fourth, because GTA has offered special access (or "private line") services since at least 1974, GTA contends these services are not new and therefore the Commission's 45 day notice rule does not apply to these tariff revisions. Even if the 45 day rule applies here, GTA contends that IT&E and others could not have been

[1] IT&E Overseas, Inc. and PCI Communications, Inc., Petition for Emergency Relief and Expedited Declaratory Ruling, Memorandum Report and Order, 7 FCC Rcd 4023 (1992) (*Show Cause Order*), *as modified in* 7 FCC Rcd 4670 (1992) (extending filing dates), *petitions for recon. pending*.

[2] On January 14, 1994, GTA applied to the Bureau's Tariff Division for special permission to correct and revise the materials included in Transmittal No. 5. On January 26, GTA amended that application to also clarify the categories of its special access service. On January 28, the Division granted the amended application for special permission. Letter from G. Vogt, Chief, Tariff Division, Common Carrier Bureau, to V. Ahern, Attorney for GTA, dated Jan.28, 1994. GTA then proceeded to file Transmittal No. 6 on that same date. Letter from V. Ahern, Attorney for GTA, to W. Caton, Secretary, FCC, dated Jan.28, 1994.

[3] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, 4 FCC Rcd 4797 (1988), *recon.*, 5 FCC Rcd 400 (1990) (*Strategic Pricing Orders*).

prejudiced by the notice provided because copies of the transmittal were served on all parties of record. GTA Opposition at 5 n.5.

6. In its petition for rejection or suspension and investigation, PCI first claims that GTA Transmittal No. 5 omits the cost data and other information required by Section 61.38 of the Commission's Rules. 47 C.F.R. § 61.38. PCI Petition at 1-2. Second, PCI contends that GTA's rates appear to be unreasonable and discriminatory because of GTA's omission of certain rate information and because of differences in the rates charges to different carriers for similar services. *Id.* at 2.

7. GTA replies to the PCI petition, first, by explaining that GTA is not able to provide detailed cost justification for the special access rates in Transmittal No. 5 because those rates are not based on any costs derived from application of the Commission's cost accounting procedures. Rather, GTA explains, these rates are based upon GTA's earlier general exchange tariff and are designed to maintain the *status quo* pending the subsequent filing of a GTA access tariff that complies with applicable requirements. GTA Opposition at 3. Second, GTA explains its calculation of the rates challenged by PCI and, on that basis, contends that such rates apply to all carriers on a reasonable and non-discriminatory basis. While acknowledging that some of its rate information might have been confusing, GTA asserts such confusion has been eliminated by subsequent changes to Transmittal No. 5. GTA Opposition at 4 n.4.

III. DISCUSSION

8. We have reviewed GTA Transmittal Nos. 5 and 6, the petitions, and GTA's opposition. While the current tariff as revised by these and earlier transmittals continues to fall short of full compliance with the Commission's access charge policies, given the recent history of telecommunications practices in Guam, the existence of pending proceedings to determine whether and to what extent the Integrated Compliance Plan proposes a reasonable procedure for addressing the *Show Cause Order,* and the need to consider petitions for reconsideration of that Order, we conclude that no compelling argument has been presented that the instant tariff revisions are so patently unlawful as to require rejection. We further conclude that these petitions do not demonstrate that suspension and investigation is warranted at this time.

9. The unusual circumstances occasioning these transmittals and their predecessors require us to consider carefully whether rejection or suspension and investigation of these transmittals would serve the public interest. As we explained in the *May 1993 Order*,[4] the instant transmittals are not submitted by GTA, nor viewed by the Bureau, as a complete response to the determinations made in the *Show Cause Order,* but rather constitute only an interim tariff which, because it establishes a generally applicable, federally tariffed basis for the provision of interexchange access, represents a significant improvement over the nonuniform and untariffed arrangements determined to be unlawful in the *Show Cause Order.*

10. While we do not permit tariffs determined to be patently unlawful to remain in effect, questionable tariffs may remain effective for a reasonable interim period during which the Commission seeks to establish a more permanent rate structure.[5] The "reasonable interim period" is determined in light of the adequacy of the record needed to act on rates, and the Commission's discretion to order its own proceedings.[6] GTA has undertaken to improve its accounting practices. In addition, when the pending separate proceedings initiated to consider GTA's Integrated Compliance Plan are resolved, they may alter the application of access charge requirements to reflect circumstances on Guam. Both record considerations and the coordination of multiple proceedings thus weigh in favor of permitting an interim tariff to become effective despite deficiencies. It is clearly preferable to have some tariff in effect, as a basis both for the application of Commission standards and as part of the broader process of implementing changes needed to rectify deficiencies cited in the *Show Cause Order,* than to reject a series of transmittals until all aspects of the *Show Cause Order* have been clarified and fully implemented. For instance, the tariff supplants any private agreements that GTA may have insisted upon in past negotiations with carriers, and precludes any threats of disconnection to compel discriminatory division of revenues. Any discriminatory departures from the tariff provisions are subject to the Commission's formal complaint and enforcement procedures.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the petition to reject Guam Telephone Authority Tariff F.C.C. No. 1, Transmittal No. 5, filed by IT&E Overseas, Inc. IS DENIED.

12. Accordingly, IT IS FURTHER ORDERED that the petition to reject or to suspend and investigate Guam Telephone Authority Tariff F.C.C. No. 1, Transmittal No. 5, filed by PCI Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[4] Guam Telephone Authority, 8 FCC Rcd 3640 (Com. Car. Bur. 1993) (*May 1993 Order*).

[5] MCI Telecommunications Corporation v. FCC, 627 F.2d 322, 338, 340 (1980). *Accord* MCI Telecommunications Corporation v. FCC, 712 F.2d 517, 535 (1983) (*MCI/ENFIA Order*).

[6] *MCI/ENFIA Order*, 712 F.2d at 535.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 7, 1994

SEVERAL SMALL TELCOS PETITION FOR WAIVER OF SMALL COMPANY TARIFF FILING RULES

Pleading Cycle Established

COMMENTS: March 10, 1994
REPLIES: March 24, 1994

Mankato Citizens Telephone Company, Mid Communications, Inc., Ogden Telephone Company, Lexington Telephone Company, and Denver and Ephrata Telephone and Telegraph Company (Telcos), on separate dates, filed petitions for waiver of CC Docket No. 86-467, *Report and Order*, 2 FCC Rcd 3811 (1987). The Telcos are small average schedule local exchange carriers with access lines ranging from approximately 10,000 to 45,000. The Telcos wish to file individually, their own Traffic Sensitive (TS) tariff in compliance with Part 61.39 of the Commission's Rules and exit the National Exchange Carrier Association (NECA) TS pool.

The Telcos state that the waiver is necessary because, under the Commission's Small Company Biennial Tariff Order, qualifying companies may file their own tariffs and opt out of the NECA pools only in odd-numbered years. All the Telcos note that in order to achieve their goal of an effective date July 1, 1994, they would have had to notify NECA by December 31, 1993 of their plan to opt out of the pools.

Interested parties may file comments on these petitions for waiver no later than March 10, 1994. Replies should be filed by March 24, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Andrew Mulitz or Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Fourth Media, File No. ENF 92-01

Apparent Liability for Forfeiture NAL/Acct. No. 216EF0001

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1994; Released: March 4, 1994

By the Commission:

1. On August 17, 1992, we issued a *Notice of Apparent Liability*, 7 FCC Rcd 5211 (1992) (NAL), to Fourth Media, a provider of adult message services. The NAL was based on a staff investigation revealing that Fourth Media had transmitted obscene material, by means of telephone and for commercial purposes, in willful and repeated violation of Section 223(b)(1) of the Communications Act (Act), 47 U.S.C. § 223(b)(1).[1] We also determined, based on the investigation, that Fourth Media had willfully and repeatedly made indecent material available by telephone to minors for commercial purposes, in violation of Section 223(b)(2) of the Act, 47 U.S.C. § 223(b)(2).[2]

2. Based on these willful and repeated violations, we found Fourth Media apparently liable for forfeiture in the amount of $350,000.[3] Pursuant to procedures set forth in Section 1.80(f)(3) of the Commission's rules, Fourth Media was afforded 30 days from the release date of the NAL to respond, either by paying the forfeiture amount or explaining in writing why the forfeiture should be reduced or not imposed at all.[4] Fourth Media failed to respond to the NAL within the time and manner prescribed by the Commission's rules. Thus, Fourth Media has presented no facts or arguments that would warrant a rescission or reduction of the forfeiture, and we now assess the forfeiture in its full amount.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 223(b) of the Communications Act, 47 U.S.C. §§151, 154(i), 154(j), 223(b), and Sections 1.80 and 64.201 of our rules, 47 C.F.R. §§ 1.80, 64.201, that Fourth Media FORFEIT to the United States Government the sum of three hundred fifty thousand dollars ($350,000) for its willful and repeated violations of Section 223(b) of the Communications Act on the dates and in the manner described in the NAL issued August 17, 1992. Payment must be made in the manner provided for in Section 1.80(h) of our Rules, 47 C.F.R. § 1.80(h), within 30 days from the release of this Order.[5] If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act.

4. IT IS FURTHER ORDERED, that a copy of this Memorandum Opinion and Order shall be sent by certified United States mail, return receipt requested, to Fourth Media's last known place of business, Suite 300, 1000 Circle Parkway, Atlanta, Georgia 30339.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] Section 223(b)(1) provides in pertinent part that no person may knowingly and for commercial purposes, by means of telephone, transmit obscene communications.

[2] Section 223(b)(2) provides in pertinent part that no person may knowingly and for commercial purposes, by means of telephone, make indecent communications available to minors without restriction.

[3] *Fourth Media*, 7 FCC Rcd at 5213. The facts and circumstances leading to the issuance of our NAL are recited in detail in the NAL and need not be reiterated at length here. During the staff investigation, representatives of the Commission's Field Operations Bureau (FOB) accessed and recorded a number of Fourth Media's adult-oriented messages, mostly during the day when children could be expected to be able to call. In placing the calls, FOB found no restrictions in place to prevent minors from accessing Fourth Media's sexually explicit messages. As a result of its investigation, the staff found conclusive evidence that Fourth Media's messages were obscene or indecent and available to minors within the meaning of Section 223(b) of the Act and relevant Supreme Court decisions. The staff determined that Fourth Media operated and was continuing to operate in violation of Section 223(b) of the Act and Section 64.201 of the Commission's rules. *Id.* at 5211-13. Section 64.201 specifies three different blocking techniques that the Commission has determined will operate as defenses to prosecution under Section 223(b)(2); the NAL concluded that none of these three techniques were used by Fourth Media at any time during the Commission's investigation. *Id.*

[4] Pursuant to Section 1.80(f)(2) of the Commission's rules, a copy of the NAL was served via certified mail to the last known address of Fourth Media on August 18, 1992. Neither the receipt nor the letter was returned. A second copy of the NAL was mailed on January 5, 1993, but was returned as undeliverable.

[5] The forfeiture amount must be paid by check or mail order drawn to the order of the Federal Communications Commission. Reference should be made on Fourth Media's check or money order to NAL/Acct. No. "216EF0001." Such remittances must be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

California Komputer Test, Inc.
Huntington Beach, California

NAL Acct. No. 215LA0049

ORDER

Adopted: February 22, 1994; Released: March 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a petition for reconsideration filed by California Komputer Test, Inc. (Petitioner) pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Los Angeles Office's October 2, 1992, action finding Petitioner liable for a monetary forfeiture in the amount of $7,000 for violating Section 302(b) of the Communications Act of 1934 as amended (the Act), 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, by marketing an uncertified personal computer. As explained below, we are reducing the monetary forfeiture penalty.

2. The appropriate amount of this forfeiture is $5,600.

II. BACKGROUND

3. On March 31, 1992, an inspector from the Commission's Los Angeles Office visited the California Komputer, Inc. store in Huntington Beach, California, as a member of the public. On display and offered for sale was a model 386SX-25 personal computer, which the investigator had seen advertised for sale in a newspaper advertisement. No FCC authorization had been obtained for this device. On August 31, 1992, the Commission's Los Angeles Office issued Petitioner a Notice of Apparent Liability (NAL) for marketing equipment without FCC authorization. On September 10, 1992, Petitioner responded to the NAL, denying intent to market the computer and denying any violation of Commission regulations.

4. Based on Petitioner's response, the Los Angeles Office issued a Notice of Forfeiture in the amount of $7,000 on October 2, 1992.

5. The Commission has received several letters from counsel for Petitioner requesting reconsideration of the forfeiture. No new facts or other evidence was presented to justify cancellation or mitigation of the forfeiture amount.

III. DISCUSSION AND CONCLUSION

6. The computer was advertised in a widely circulated local newspaper. It was found on display in a local retail store. The newspaper advertisement of the computer and its display in a retail store clearly demonstrate Petitioner's intent to market it.[1] Uncertified personal computers may be displayed in a marketing environment only if the display is accompanied by a conspicuous notice as specified in Section 2.803 of the Commission's Rules.[2] No such notice accompanied the newspaper advertisement nor the unit on display in the retail store.

7. The Commission has recently revised its policy regarding issuance of forfeitures. *See 1993 Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). Based on this new policy and the fact that there is no record of previous violations of this type by Petitioner, we are reducing the amount of the forfeiture to $5,600. No other adjustments appear to be applicable.

IV. ORDERING CLAUSES

8. IT IS ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, the relief sought in the Petition for Reconsideration filed by California Komputer Test, Inc. is DENIED.

9. IT IS FURTHER ORDERED that California Komputer Test, Inc. shall forfeit to the United States the sum of five thousand, six hundred dollars ($5,600). This amount must be paid within 30 days of the receipt of this order.[3] Payment must be by check or money order payable to the Federal Communications Commission. Please place NAL account number #215LA0049 on the remittance and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested, to California Komputer Test, Inc., and to its counsel.

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[1] Section 2.803 states in part: "In the case of a radio frequency device which, in accordance with the rules of this part, must be ... certificated or notified prior to use, no person shall sell or lease, or offer to sell or lease (including advertising for sale or lease) or import, ship or distribute for the purpose of selling or leasing or offering for sale or lease, any such radio frequency device, unless, prior thereto, such devices shall have been ... certificated or notified as the case may be."

[2] The required notice must state: "This device has not been approved by the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased until the approval of the FCC has been obtained."

[3] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Office, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Field Operations Bureau
Washington, D.C. 20554

LETTER
February 22, 1994

Released: March 4, 1994

Mr. Frank R. Shughart
3511N Taylor Road
Oak Harbor, Washington 98277

In reply, refer to:
315FE0085

Dear Mr. Shughart:

This is in response to your November 16, 1993, letter requesting review of the monetary forfeiture bearing the above control number assessed against you for operation of an unlicensed ship radio station. We have decided to reduce the amount of the forfeiture to $100.

As you have been previously informed, a ship radio station license is not transferrable. It is issued to a particular entity only to authorize operation of the radio installation aboard a particular vessel. When a vessel is sold, the seller must return the license to the Commission with a request that it be cancelled. If the seller purchases another vessel, he or she must apply for a new ship station license, even if the radio equipment from the old vessel is removed and installed on the new vessel.

We note that your former ship station license, WYW5491, issued to you for use aboard your vessel TOMMIE JEAN, expired on April 17, 1985. Therefore, if you did not dispose of the TOMMIE JEAN until sometime in 1986, the station license had apparently already expired and could not have been transferred to your new vessel SHUGHART even if station license transfers were permissible. Commission ship station license records between 1985 and November 2, 1993, when your current license, WCB7062, was issued, fail to confirm that you held any ship station license for either your old or new vessels.

We concur that you should have been provided correct ship station licensing information when you requested it from the Commission in 1986. However, the fact that you did not receive it fails to explain or justify why your vessel remained unlicensed for over eight years. Therefore, your request that the forfeiture be cancelled is denied.

The Commission has recently reviewed and revised its policy for issuing forfeitures of this type. *See 1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993). In view of this new policy, we are reducing the amount of this forfeiture to $100. Therefore, you are ordered to forfeit the sum of $100 to the United States.

With your November 16, 1993, letter you forwarded a personal check for $400. With the issuance of this letter, we order a refund of the $300 difference which you will receive in the form of a check.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of

California Pet Containment	NAL/Acct. No.: 315LA0109
The Canine Fence Company	NAL/Acct. No.: 315LA0105
Hollywood Dog Training School	NAL/Acct. No.: 315LA0106
Kitty City	
Invisible Fence of the North Pacific	NAL/Acct. No.: 315LA0110
The Kennel Club	NAL/Acct. No.: 315LA0107
West Coast Invisible Fence	NAL/Acct. No.: 315LA0108

For a Forfeiture

ORDER

Adopted: February 23, 1994; Released: March 4, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration submitted under Section 1.106 of the Federal Communications Commission's (FCC) rules, and dated October 28, 1993. 47 C.F.R. Section 1.106. The Petition was submitted by counsel on behalf of California Pet Containment, The Canine Fence company, Hollywood Dog School & Karl's Kitty City, Invisible Fence of North Pacific, The Kennel Club, and West Coast Invisible Fence (Invisible Fence Dealers). The Petition requests that the FCC "cancel the $5,600 assessed against each of the" Invisible Fence Dealers.[1]

2. The $5,600 monetary forfeiture penalty issued to each Invisible Fence Dealer is reduced to $2,000 for each Dealer.

II. BACKGROUND

3. The FCC received a complaint that invisible fence pet containment devices were being marketed without FCC authorization. A pet containment system is designed to teach pets to stay within the boundaries of their yards by the use of low power radio systems (invisible fencing). An FCC investigator telephoned the Invisible Fence Dealers, expressed an interest in buying their invisible fence pet containment systems, and requested brochures and price lists. The Invisible Fence Dealers sent the FCC investigator brochures and price lists for various models of invisible fence pet containment systems manufactured by Invisible Fence Company, Inc., Malvern, Pennsylvania. The systems had not been authorized by the FCC.

4. On July 28 and August 4, 1993, the FCC's Los Angeles Office issued a Notice of Apparent Liability for a $7,000 monetary forfeiture penalty to each of the Invisible Fence Dealers for willfully violating Section 302(b) of the Communications Act of 1934 and Section 2.803 of the FCC's rules. 47 U.S.C. Section 302(b), 47 C.F.R. Section 2.803. The Notices provided relevant details regarding the violations such as the date of the complaint, the date when each Invisible Fence Dealer was telephoned by the FCC, the dates when brochures and price lists were received by the FCC, and the model number and price for each pet containment system listed in the brochures. The counsel for the Invisible Fence Company, the manufacturer of the containment systems, submitted a consolidated response to the Notice of Apparent Liability issued to the Invisible Fence Dealers on September 9, 1993. On October 14, 1993, the FCC's Los Angeles Office issued each of the Invisible Fence Dealers a Notice of Forfeiture for a $5,600 monetary forfeiture penalty. The FCC's 1993 *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) (*1993 Policy Statement)* recommends $7,000 as the base forfeiture amount for this type of violation, and provides criteria for reducing forfeitures which the FCC's Los Angeles Office applied to arrive at the $5,600 penalty. The penalty was reduced because of lack of evidence of prior violations.

5. Section 302 of the Communications Act authorizes the FCC to regulate the interference potential of radio frequency devices, and prohibits the marketing of devices that fail to comply with the FCC's rules. The FCC's authority to impose monetary forfeiture penalties for violations of the Communications Act and the FCC's rules is contained in Section 503(b) of the Communications Act. 47 U.S.C. Section 503(b).

III. DISCUSSION AND CONCLUSION

6. The Invisible Fence Dealers state several reasons why the monetary forfeiture penalties should be reduced or canceled. The Invisible Fence Dealers explain that the penalties should be reduced based on the good faith or voluntary disclosure reduction criterion contained in the *1993 Policy Statement*. They further explain that this reduction criterion should apply since they relied on the manufacturer for compliance with the FCC's rules, and that the manufacturer was told by the FCC in the late 1970's that FCC authorization was not required. Copies of the manufacturer's manuals for dealers were provided which stated that the systems did not require licensing, and this was understood to mean FCC authorization. It was also explained that the manufacturer sought to bring the pet containment systems into compliance with the FCC's rules before the Notices of Apparent Liability were issued.

[1] The October 28 submission was an application for Review of the forfeiture by the Commission under Section 1.115 of the FCC's rules. 47 C.F.R. Section 1.115. However, in December 1993, during a telephone conversation between counsel for the Invisible Fence Dealers and Chief of the Field Operations Bureau's Enforcement Division, it was agreed that the October 28 submission should be treated as a Petition for Reconsideration under 1.106 of the FCC's rules.

7. The Invisible Fence Dealers also argue that the monetary forfeiture penalty should be reduced because the alleged violation was minor within the violation category, in other words, that it was minor relative to other marketing violations. They claim it was minor because the pet containment systems did not cause interference to other electrical devices, operated at a low signal strength, and qualified for FCC authorization.

8. We have reviewed your Petition and find that some of your arguments have merit. Accordingly, based on the discretion specifically reserved in the *1993 Policy Statement*, we are reducing the monetary forfeiture penalty to $2,000 for each Invisible Fence Dealer.

IV. ORDERING CLAUSES

9. IT IS ORDERED that under Section 503(c)(b) of the Communications Act of 1934 and Section 1.80(h) of the FCC's rules, the monetary forfeiture penalty assessed against each of the Invisible Fence Dealers is reduced to $2,000. 47 U.S.C. Section 503(c)(b), 47 C.F.R. Section 1.80(h).

10. IT IS FURTHER ORDERED that each Invisible Fence Dealer (which are listed individually in paragraph 11 of this Order) pay the $2,000 monetary forfeiture penalty within 30 days of the receipt of this Order. Payment may be by check or money order payable to the Federal Communications Commission. the account number listed in paragraph 11 of this Order next to the name of each Invisible Fence Dealer should be placed on the check. the forfeiture payments should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If a monetary forfeiture penalty is not paid within 30 days, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

11. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to the counsel for the Invisible Fence Dealers and to each Invisible Fence Dealer listed below:

California Pet Containment
23461 Ridge Route Drive
Suite D
Laguna Hills, California 92643
NAL/Acct. No.: 315LA0109

The Canine Fence Co.
493 Danbury Road
Wilton, CT 06897
NAL/Acct. No.: 315LA0105

Hollywood Dog Training
School & Karl's Kitty City
10805 Vanowen St.
North Hollywood, California
91605
NAL/Acct. No.: 315LA0106

Invisible Fence of the
North Pacific
P.O. Box 1575
Mercer Island, Washington
98040
NAL/Acct. No.: 315LA0110

The Kennel Club
5325 W. 102nd St.
Los Angeles, California 90045
NAL/Acct. No.: 315LA0107

West Coast Invisible Fence
1560-1 Newbury Road #183
Newbury Park, California
91320
NAL/Acct. No.: 315LA0108

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
February 24, 1994

Released: March 4, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

James I. Stansell, Jr., President	8310-SP
KTBB Radio, Inc., Licensee	93090603
Radio Station KTBB(AM)	93091194
South Park Centre	94010097
1828 ESE Loop 323, Suite 317	
Tyler, TX 75701	

Dear Mr. Stansell:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. Our action is based on the facts set forth below.

The Commission received a complaint alleging that on August 17, 1993, KTBB(AM) talk show host Phillip Rasak placed a telephone call to Ms. Arlene Roberts at the Smith County Commissioners' Office, and broadcast the conversation simultaneously with its occurrence without informing Ms. Roberts of its broadcast. Based on this complaint, the Commission sent KTBB Radio, Inc., a letter of inquiry on December 9, 1993. You responded by letter dated December 20, 1993, confirming that the telephone call was placed on August 17, 1993, and broadcast simultaneously with its occurrence. You state that, upon learning of this incident, you conveyed to Mr. Rasak "that his broadcast of the telephone conversation without informing Ms. Roberts was in violation of the FCC's rules and regulations." You also state that you emphasized the seriousness of this violation and gained Mr. Rasak's assurance that it would not happen again.

Notwithstanding the withdrawal of the complaint by both Ms. Roberts and her employer, Judge Larry Craig, you have admitted that Radio Station KTBB(AM), Tyler, TX, violated Section 73.1206 of the Commission's Rules on August 17, 1993, by broadcasting the telephone conversation with Ms. Arlene Roberts without informing her at the outset of the conversation that it was being broadcast. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, KTBB Radio, Inc., licensee of Station KTBB(AM), Tyler, TX, is hereby advised of its apparent liability for a forfeiture in the amount of $5,000.00 for said incident, which constitutes a willful violation of Section 73.1206. The amount of the forfeiture was determined by using the criteria set forth in the *Policy Statement on Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carriers' Rates, Terms,
and Conditions for Expanded
Interconnection for Switched Transport

CORRECTION

Released: February 25, 1994

On February 14, 1993, the Common Carrier Bureau (Bureau) released an Order suspending switched transport expanded interconnection tariffs for one day and initiating an investigation.[1] This Order is corrected by deleting paragraph 16.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief
Common Carrier Bureau

[1] Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Switched Transport, DA 94-142, Memorandum Opinion and Order, released Feb. 14, 1994 (Com. Car. Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Contract Tariff F.C.C. No. 722

Contract Tariff Transmittal No. 1015

ORDER

Adopted: February 25, 1994; Released: February 25, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 1, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] These revisions, as amended, are currently scheduled to become effective February 27, 1994.[2] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 722 for AT&T Software Defined Network (SDN) Service Domestic, International and Global; AT&T 800 Services; AT&T Private Line Services-Domestic and AT&T Local Channel Services.

2. On December 7, 1993, Tel-Save, Inc. (Tel-Save) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 1015. AT&T filed a reply on December 17.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 722, Contract Tariff Transmittal No. 1015 and Tel-Save's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No.722, Contract Tariff Transmittal No. 1015, filed by Tel-Save, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] On February 24, 1994, AT&T filed Contract Tariff Application Number 261, amending the value offer contained in Transmittal 722.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff Transmittal No. 1014
Contract Tariff F.C.C. No. 721

ORDER

Adopted: February 25, 1994; Released: February 25, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 1, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] These revisions, as amended, are currently scheduled to become effective February 27, 1994.[2] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 721 for AT&T Software Defined Network (SDN) Service Domestic, International and Global; AT&T 800 Services; AT&T Private Line Services-Domestic and AT&T Local Channel Services.

2. On December 7, 1993, Tei-Save, Inc. (Tel-Save) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 1014. AT&T filed a reply on December 17.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 721, Contract Tariff Transmittal No. 1014 and Tel-Save's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No.721, Contract Tariff Transmittal No. 1014, filed by Tel-Save, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] On February 24, 1994, AT&T filed Contract Tariff Application Number 261, amending the value offer contained in Transmittal 721.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 25, 1994

FCC FREEZES COMPARATIVE PROCEEDINGS

The FCC is holding in abeyance the processing of applications and the adjudication of hearing proceedings involving mutually exclusive proposals for new broadcast facilities in light of the opinion of the United States Court of Appeals for the District of Columbia in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). This ruling held that the integration of ownership into management, one of the principal criteria used in evaluating applicants for new broadcast facilities, is arbitrary and capricious and therefore unlawful.

The court's action reversed and remanded the Commission's memorandum opinion and order in *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), *modified*, 8 FCC Rcd 1674 (1993), in which the Commission awarded a construction permit for a new FM radio station in Selbyville, Delaware. The court accepted the arguments of applicant, Susan M. Bechtel, that the Commission's policy of granting comparative credit to applicants proposing that their owners will participate in the day-to-day management of the station was unlawful. Accordingly, the court ordered that the Commission consider Ms. Bechtel's application and any other application properly before it, under standards free of the integration policy.

Because integration has been a crucial factor in many recent comparative proceedings, the Commission has decided to stay such pending cases while it considers appropriate action responsive to the court's opinion. The Commission will also consider taking further action in a rulemaking initiated in 1992 to reexamine the comparative process. *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992); 8 FCC Rcd 5475 (1993).

During the freeze, predesignation procedures and hearing proceedings (except those aspects of hearing proceedings not involving comparative analysis of new applicants' proposals) will be suspended. The freeze will apply both to new applicant proceedings and comparative renewal proceedings.

Further, during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities or require the filing of amendments, integration proposals, or hearing fees. Applicants should, however, file amendments to update information relevant to their applications. Any such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze. No cases will be designated for hearings involving a standard comparative issue.

The Commission, Review Board, and Administrative Law Judges will continue to issue decisions only in cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case, and appeals will be entertained only of such decisions. ALJs will, however, continue to take evidence with respect to already specified basic qualifying issues or 307(b) issues in pending cases. Where a proceeding has been remanded to an ALJ for consideration of a basic qualifications issue, the ALJ will issue a supplemental initial decision addressing the remanded issue. All other procedures involving the filing of pleadings and preparation of decisions involving analysis of applicants' comparative proposals will be held in abeyance. Proceedings for the selection of noncommercial educational licensees will not be affected because they involve standards unrelated to those considered in *Bechtel*.

Because the final resolution of the issues raised by *Bechtel* may take some time, the Commission wishes to facilitate both pre-and post-designation settlements among pending applicants. To this end, the Chief Administrative Law Judge will appoint settlement judges, who will have the authority to convene conferences for the applicants to explore the possibility of voluntary settlements. Settlements conforming to Commission policy may be submitted, depending on the status of the proceeding, to the Commission, Review Board, or ALJ with jurisdiction over the proceeding, as appropriate, and approved during the freeze in accordance with the Commission's current policies governing such settlements. In view of *Bechtel*, prevailing applicants will not be required to adhere to their integration proposals in such settlements.

Action by the Commission: February 24, 1994, by Public Notice (FCC 94-41). Chairman Hundt, Commissioners Quello and Barrett.

For further information contact: David S. Senzel at (202) 632-7220.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of

Implementation of Sections 3(n) and 332 of the Communications Act

Regulatory Treatment of Mobile Services

FIRST REPORT AND ORDER

Adopted: January 4, 1994; Released: January 5, 1994

By the Commission:

I. INTRODUCTION

1. On September 23, 1993, we adopted a *Notice of Proposed Rule Making* (*Notice*)[1] in which we proposed, *inter alia*, to establish a procedure by which private land mobile radio licensees that will be reclassified as commercial mobile radio service (CMRS) providers pursuant to this rule making proceeding could file a waiver petition to retain existing foreign ownership. We now establish the filing procedure for these waiver petitions and remind all potentially affected licensees of the February 10, 1994, filing deadline. We also emphasize that filing such a petition will not prejudice the licensee's right at a later date to assert that it should not be classified as a CMRS provider.

II. BACKGROUND

2. The Omnibus Budget Reconciliation Act of 1993 (Budget Act)[2] amended Sections 3(n) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(n), 332 (Communications Act), to create a comprehensive regulatory framework for all mobile radio services. "[A]ny provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993" is subject to the foreign ownership restrictions imposed on common carriers by Section 310(b) of the Communications Act, 47 U.S.C. § 310(b).[3] Nevertheless, the statute allows affected licensees to petition the Commission for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. The statute requires that these petitions for waiver be filed with the Commission by February 10, 1994 (within 6 months of enactment of the Budget Act). The Commission may grant such waivers to eligible petitioners only upon the following conditions:

> (A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.
>
> (B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b).

47 U.S.C. § 332(c)(6)(A), (B).[4]

3. Section 310(b) states in relevant part:

> No ... common carrier ... license shall be granted to or held by --
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;
>
> (3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
>
> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

For the purposes of Section 310(b), certain partnership interests, as well as certain other interests held by non-corporate entities and associations, may be considered ownership interests.[5]

4. The *Notice* proposed to establish a petition procedure to allow licensees to "grandfather" their foreign ownership. Under this procedure, petitioners would be required to (1) identify all foreign persons or entities holding an interest

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[1] GN Docket No. 93-252, 8 FCC Rcd 7988, 8002-03 ¶ ¶ 76-78 (1993).

[2] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392, 395 (1993); *see* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 492, 494-95 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1179, 1183-84.

[3] *See* 47 U.S.C. § 332(c)(6); *see also* Budget Act, § 6002(c)(2)(B) (effective dates). For the text of Section 310(b), see paragraph 3, *infra*.

[4] In regard to condition (B), the legislative history of the amended statute states: "In effect, this condition "grandfathers" only the particular person who holds the foreign ownership on May 24, 1993; the "grandfathering" does not transfer to any future foreign owners." H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 495 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1184.

[5] *See, e.g.*, Wilner & Scheiner, 103 FCC 2d 511 (1985), *reconsideration granted in part*, 1 FCC Rcd 12 (1986); *see also* Moving Phones Partnership, L.P. v. FCC, 998 F.2d 1051, 1055-57 (D.C. Cir. 1993). Section 310(b) was amended in 1974 to eliminate the restriction on alien ownership of private radio licensees. P.L. 93-505, 88 Stat 1576; H.R. Report No. 93-1423, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6305, 6307. However, the ban on licensing radio facilities to foreign governments or representatives, established in Section 310(a), still applies to all licensees.

in the licensee and the percentage of ownership interest for each; and (2) certify that the identity and level of foreign ownership are unchanged since May 24, 1993, and that no change will occur in the future (other than divestiture of a foreign ownership interest to a domestic person or entity) without prior notice to the Commission.[6]

5. The *Notice* indicated that we intend to place the burden on licensees to file petitions, regardless of whether we have made a final determination as to whether the licensee is subject to reclassification as a CMRS provider. Furthermore, the *Notice* stated that while the filing of a petition would not prejudice a licensee's future arguments as to whether it should be reclassified, licensees who failed to file a timely petition would be subject to immediate enforcement of our foreign ownership restrictions.[7]

III. COMMENTS

6. A single commenter responded to this issue. Roamer One, Inc., argues that the *Notice* misread the Budget Act's amendment to the Communications Act to the extent that it imposes "immediate" foreign ownership restrictions on all private radio licensees.[8] It maintains that while the *Notice* refers to private land mobile service providers that "may" be treated as common carriers, the statute refers to existing private land mobile service providers that "will" be treated as common carriers as a result of the enactment of the Budget Act.)[9] It contends that, prior to the completion of this rule making proceeding, the Commission may not impose alien ownership restrictions on private radio licensees who are unlikely to be classified as CMRS providers.[10]

IV. DISCUSSION

A. Who Should File a Waiver Petition

7. Initially, we agree with Roamer One that Section 332(c)(6) does not impose foreign ownership restrictions on all private radio licensees. As noted above, the foreign ownership restrictions apply only to those current private land mobile service providers that "will be" classified as CMRS providers "as a result of enactment of the [Budget Act]." As we discussed in the *Notice*, a private land mobile radio licensee could potentially be reclassified as a CMRS licensee if it meets two criteria: its service (1) is "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as to be effectively available to a substantial portion of the public." In addition, it is possible that a service might not fully satisfy the two criteria, but nonetheless be classified as CMRS if the Commission were to find that the service is the "functional equivalent" of CMRS.[11] If a licensee determines that there is a possibility that it will be reclassified as a CMRS provider, it must also determine whether its foreign ownership as of May 24, 1993, would be prohibited under Section 310(b).[12]

8. Final rules governing regulatory classification of mobile services may not be available on or before the February 10, 1994, filing deadline. We recognize that this presents private land mobile licensees with the potentially difficult decision of whether they should file petitions for waiver. Therefore, in instances where there is any chance at all that the licensee might later be classified as a CMRS provider, we strongly encourage the licensee to err on the side of filing and thereby preserve all of its rights under the new statutory provisions. Similarly, if a licensee is uncertain of whether it would be affected by Section 310(b) restrictions absent a waiver, we strongly recommend that the licensee file a petition.

B. Contents of Waiver Petition

9. As noted above, Section 332(c)(6) permits the Commission to grant waiver petitions only where two conditions are met. First, the waiver can only cover "the [licensee's] extent of foreign ownership interest [that has] not ... increased above the extent which existed on May 24, 1993." Consistent with the legislative history quoted previously (*see* note 4, *supra)*, we interpret this language to refer to the precise identities of persons or entities and not merely to preexisting levels of foreign ownership interests. Petitioners must therefore identify in their petitions all foreign interests in the licensee as of May 24, 1993, that would, absent a waiver, be subject to the Section 310(b) restrictions and for which a waiver is sought. For instance, except as noted below, petitioners should specifically identify all foreign persons or entities holding an ownership interest in the licensee and the percentage of ownership interest of each and identify all foreign partners,[13] officers, and directors, regardless of whether they have any ownership interest. While we will not require publicly traded corporations[14] to identify each foreign stockholder in instances where this requirement would be especially onerous,[15] we note that it is the responsibility of all petitioners to ensure that all foreign ownership listed in the petition,

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[6] *Notice*, 8 FCC Rcd at 8002-03 ¶ 77.

[7] *Id.* at 8003 ¶ 78.

[8] Comments of Roamer One, Inc., at 15-16 (Nov. 8, 1993); *see also id.* at iii-iv.

[9] *Id.* at 15.

[10] *Id.*

[11] *See Notice*, 8 FCC Rcd at 7990-96 ¶ ¶ 10-40.

[12] *See paragraph 3, supra.*

[13] Petitioners must list all foreign partners regardless of whether they are general or limited partners, except that petitioners need not list a limited partner (1) whose level of ownership interest in the licensee does not exceed the level allowed by Section 310(b), and (2) who is "insulated" from the management and control of the partnership. *See, e.g.*, Wilner and Scheiner, *supra*, 103 FCC 2d at 517 n.31, 520 n.43; Attribution of Ownership Interests, Memorandum Opinion and Order in MM Docket No. 83-46, 58 RR 2d 604, 619-20 ¶ ¶ 48-50 (1985).

[14] For a definition of such corporations, see First Report and Order and Memorandum Opinion and Order on Reconsideration in CC Docket Nos. 90-6, 85-388, 6 FCC Rcd 6185, 6213 ¶ 63 (1991).

[15] *See, e.g.*, Advanced Mobile Phone Inc., 54 RR 2d 354, 362 ¶ 29 (Com. Car. Bur. 1983) (applicant demonstrated sufficient compliance with the requirements of FCC Form 401 by indicating the percentage of its common stock held or voted by aliens, and by listing the identities of its ten largest stockholders and stating that none of them was an alien, and would not be required to circulate a questionnaire to all of its stockholders). The burden will be on any entity claiming such an onerous burden to explain why identifying individual shareholders would be extraordinarily burdensome.

including that held by individual stockholders, did exist as of May 24, 1993, and to retain documentation substantiating that ownership.

10. The second condition is that the waiver cannot permit any "subsequent transfer of ownership to any other person in violation of section 310(b)." We interpret "subsequent" here to mean subsequent to May 24, 1993. Petitioners must therefore certify in their petitions that the identity and percentages of each listed component of foreign ownership are unchanged since May 24, 1993, and that each listed foreign officer, director or partner continues to hold the same position. The waiver can recognize only the particular person or entity that held the ownership interest on May 24, 1993; it cannot recognize any subsequent transfers to other foreign owners or foreign officers or directors.[16] If, following the grant of a waiver in light of the above condition, a licensee wishes to transfer "grandfathered" foreign ownership interests, the waiver will remain valid (for the remaining "grandfathered" interests) only if the transfer is made to a domestic person or entity.[17] The same is true for "grandfathered" partners, officers, and directors.

C. Effective Date of Section 310(b) Restrictions

11. Roamer One appears to object to our statement in the *Notice* that "all reclassifiable private licensees are *immediately* subject to the foreign ownership restrictions on common carriers by Section 310(b)."[18] As noted above, Roamer One contends that, prior to the completion of this rule making proceeding, the Commission should not impose alien ownership restrictions on private radio licensees who are unlikely to be classified as CMRS providers. We agree that the restrictions in Section 310(b) would only apply to licensees that are actually reclassified pursuant to the statute and its implementation in this rule making. Section 310(b) does not and will not apply to private land mobile radio licensees who will not be reclassified as CMRS providers. On the other hand, the statute does require immediate enforcement of Section 310(b) for private land mobile providers that are reclassified as CMRS. Section 6002(c)(2)(B) of the Budget Act states:

> [A]ny private land mobile service provided by any person before [the Budget Act's] date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall, *except for purposes of section 332(c)(6) of [the Communications Act]*, be treated as a private mobile service until 3 years after such date of enactment.

Budget Act, § 6002(c)(2)(B) (emphasis added). Although other common carrier regulation may not apply to some licensees for 3 years, unless a licensee timely files and is granted a waiver pursuant to Section 332(c)(6), Section 310(b) will apply immediately upon the effective date of our rules reclassifying the licensee's service as CMRS. Accordingly, as stated above, licensees that may be reclassified should file a timely waiver request to grandfather any foreign ownership or other interest that existed as of May 24, 1993, and that might be affected by the application of Section 310(b).

V. PETITIONING PROCEDURE

12. In light of the above, we adopt the following petitioning procedure. First, petitions should be in an informal, letter format, and must contain the caption "COMMERCIAL MOBILE RADIO SERVICE FOREIGN OWNERSHIP WAIVER PETITION." Petitions must clearly specify the licensee's name, radio service, call sign(s), station address(es) or geographical location(s), and contact person with telephone number. Petitions must specifically request a waiver of Section 310(b), identify the particular subsection(s) of Section 310(b) for which the waiver is requested, and state that the waiver is sought under Section 332(c)(6). The original copy of the waiver petition must be signed by the licensee,[19] and this signature will be taken to certify that all statements made in the petition are true, complete, correct, and made in good faith.

13. In addition, as proposed in the *Notice*, petitions must:

> 1) identify by name,[20] as of May 24, 1993, all foreign persons or other entities holding ownership interests in the licensee, directly or indirectly, that would, absent a waiver, not be permitted to hold such interests under Section 310(b), and for which a waiver is sought; likewise, petitions must identify similarly situated foreign partners, officers, or directors of the licensee, regardless of whether they have any ownership interest in the licensee;
>
> 2) as applicable, as of May 24, 1993, identify the following for each person or other entity (including officers, directors and partners) identified in (1) above: residence, citizenship, office or directorship held, number of shares or nature of partnership interests, number of votes, and percentage of votes; also, if the entity is other than an individual, petitions must also identify the name, address, and citizenship of the natural person authorized to vote the stock; and
>
> 3) answer the following:
>
> (a) Have the ownership and other interests listed pursuant to (1) and (2) above remained the same since May 24, 1993?

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[16] *See* note 4, *supra*. Thus, transfers to aliens that occurred after May 24 are not covered by the grandfathering provisions of the Budget Act even if they occurred before the Budget Act was enacted on August 10, 1993. Where such a transfer is found to create an ownership interest in violation of Section 310(b), the licensee will be required to comply with Section 310(b) with respect to that interest, regardless of whether alien ownership in the licensee that existed prior to May 24 is grandfathered.

[17] Licensees seeking to transfer their ownership or control would also be required to comply with Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), and with applicable Commission rules.

[18] *Notice*, 8 FCC Rcd at 8002 ¶ 76 (emphasis added).

[19] *See* Section 1.913 of the Commission's Rules, 47 C.F.R. § 1.913.

[20] As noted previously, publicly traded corporations are not required to identify all individual stockholders when to do so would constitute an especially onerous burden. *See* notes 14-15, *supra*, and accompanying text.

(b) Have the officers, directors or partners continued to retain their positions since May 24, 1993?

If the answer to (a) or (b) is "No," please explain.

14. Petitioners must also certify that, in the case of an individual petitioner, he or she is not subject to a denial of federal benefits, that includes FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual petitioner, (*e.g.*, corporation, partnership, or other unincorporated association), no party to the application is subject to a denial of federal benefits, that includes FCC benefits, pursuant to that section. For the definition of a "party" for these purposes, *see* 47 C.F.R. § 1.2002(b).

15. The Commission has no authority to extend the Congressionally mandated deadline date, so it is imperative that waiver petitions be filed on time. To be timely received, petitions must, *by February 10, 1994*, be either (1) hand-delivered to the offices of the FCC in Gettysburg, Pennsylvania, at the address below, or (2) received through the U.S. Mail or other mail delivery service at the address below.

Federal Communications Commission

Attn.: CMRS Foreign Ownership Waiver Petition

1270 Fairfield Road

Gettysburg, Pennsylvania 17325-7245

Licensees should file one original and two copies. These petitions do not require a filing fee.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

16. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and purpose of, this action

As a result of recent legislation, certain private land mobile radio licensees will be reclassified as commercial mobile radio service licensees and will be subject to foreign ownership restrictions within the Communications Act of 1934, as amended. This present *First Report and Order* describes the procedure by which such licensees may file a waiver petition with the Commission to request retention of existing foreign ownership that would otherwise not be permitted.

B. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

In regard to the foreign ownership issue addressed by this *First Report and Order*, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant alternatives considered

No significant alternatives were considered.

VII. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 332(c)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(c)(6), this *First Report and Order* is adopted, effective upon publication in the Federal Register.[21]

18. For further information on filing a waiver petition, contact the Private Radio Bureau, Licensing Division, Consumer Assistance Branch, (717) 337-1212. For further information regarding this *First Report and Order*, contact Carmen Cintron at (202) 632-6450 (Common Carrier Bureau, Mobile Services Division) or Eric Malinen at (202) 632-6497 (Private Radio Bureau, Land Mobile and Microwave Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[21] In light of the statutory deadline for filing petitions, we find that there is good cause to make this action effective immediately upon publication in the Federal Register.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1994 Annual
Access Tariffs and for
Other Cost Support Material

ORDER

Adopted: February 18, 1994; Released: February 18, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order sets forth certain requirements that will govern summary cost support material that local exchange carriers (LECs) must file to support their annual access charge tariff filings on or before April 1, 1994, to partially fulfill the requirements established in Sections 61.38, 61.39, 61.41 through 61.49, and 61.50 of the Commission's Rules.[1] Specific data formats are detailed in the annual access tariff review plans (TRPs), and are appended to this Order.[2] The TRPs display basic cost, demand, and rate information in a consistent manner for various classes of LECs, described below, thereby aiding review by the Commission and interested parties of the LECs' annual access tariff filings. The annual access TRPs have served this purpose effectively in past years.

2. Because currently all Tier 1 LECs[3] that are not NECA pool members have elected either price cap regulation or optional incentive regulation, we have eliminated the Tier 1 TRP for this year and are instead requiring all LECs that file prospective cost support data to file the Tier 2 TRP, which is being renamed the rate of return TRP.

3. This order sets forth certain cost support requirements in addition to the annual TRPs. First, as required by the *Second Transport Order*,[4] we have developed a one-time supplemental TRP for LECs that file under our price cap rules[5] to verify that the initial indexes for the new trunking basket have been correctly computed. The supplemental TRP is to be filed on the same date as the annual TRP on April 1, 1994, or the same date as the earliest tariff filing that affects rates for the trunking or traffic sensitive baskets, whichever filing is earlier. In order to conform to the requirements of the *Second Transport Order*, the supplemental TRP should be filed under separate cover from the tariff transmittal that it accompanies.[6]

4. Second, in order to help us verify price cap computations for tariff filings that affect rates and that are made between annual access tariff filings, we are formalizing the process governing submission of the cost support information that accompanies these filings. Based on informal discussions with the Bureau, price cap LECs have in most cases been filing updated TRPs, including analyzer charts,[7] with tariff filings that change rates. These updated TRPs offer a convenient way for price cap LECs and the Commission to track changes in the LECs' index information and to verify that filed rates meet the price cap index and band requirements. We therefore require that price cap LECs include updated TRP charts in support of price cap filings that affect rates, including restructures, made between annual filings. In order to assure that the format for these filings will be uniform, we direct LECs to file a 3.5 inch high-density computer disk as well as a hardcopy of the updated TRP and analyzer chart. The hardcopy version of the analyzer chart should be formatted to fit on a single page. This requirement will become effective July 1, 1994, coinciding with the effective date of the 1994 annual access tariff filings.[8]

II. BACKGROUND

5. Based on the Bureau's continued experience in reviewing the LECs' interstate access tariffs, the TRP data the LECs submitted in previous filings,[9] and the recent changes to the Commission's Rules,[10] we must modify some of last year's information requirements. The modifications we make were developed through informal discussions with

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[1] *See* 47 C.F.R. §§ 61.38, 61.39, 61.41 through 61.49, and 61.50. Compliance with the requirements set forth in this Order does not ensure acceptance of carriers' access charge tariffs or replace total support material requirements. Carriers remain obligated to submit adequate supporting documentation for their access charges.

[2] The annual access TRP formats are developed for the specific circumstances of the calendar year in which the tariffs will become effective. Thus, the TRPs discussed in this Order, which will accompany the April 1, 1994, annual access tariff filings scheduled to become effective on July 1, 1994, will be referred to as the 1994 TRPs.

[3] Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commissions's Rules uses to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the $100 million mark in each of five consecutive years. *See also* Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (released Jan.25, 1985).

[4] *See Transport Rate Structure and Pricing*, CC Docket No. 91-213, Second Report and Order, FCC 94-9 (released January 31, 1994) (*Second Transport Order*), para. 37.

[5] *See* 47 C.F.R. §§ 61.41 through 61.49.

[6] *See Second Transport Order* at para. 37, which states that "The LECs should file such recalculated indexes with the Commission in a special filing not accompanied by rate changes."

[7] Analyzer charts are price cap TRP summary charts.

[8] This requirement is pending on OMB approval.

[9] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with 1993 Annual Access Tariffs, 8 FCC Rcd 1936 (1993) (*1993 TRP Order*).

[10] *See, e.g., Second Transport Order*.

telecommunications industry representatives and from comments suggesting improvements and modifications to the 1993 TRPs filed by interested parties.[11]

III. PRICE CAP TARIFF REVIEW PLAN

A. Introduction

6. In the *LEC Price Cap Order*,[12] the Commission adopted mandatory price cap regulation for the regional Bell Operating Companies (RBOCs)[13] and for GTE Telephone Operating Companies (GTOC). Since that Order, United Telephone Companies (United), Contel Corporation (Contel), Southern New England Telephone Company (SNET), Rochester Telephone Corporation (Rochester), and Lincoln Telephone Company (Lincoln) have elected to file as price cap carriers. The rules require these carriers to make their 1994 annual access tariff filings under the price cap rules. Any other carrier may elect price cap regulation as part of its 1994 annual filing. A carrier subject to price caps or electing price caps in the 1994 annual filing must file the price cap TRP outlined below. The price cap TRP is contained in Appendix A.[14]

7. The 1994 price cap TRP is a modified version of the 1993 price cap TRP. Two changes will make a significant difference between the 1994 version and the 1993 TRP for price cap LECs. First, the 1994 TRP displays new rate elements and index categories resulting from the restructures of transport services. Changes to the transport structure will cause modifications to almost every price cap chart. Second, we are no longer requiring LECs to report mileage band data for transport rate elements. Under the new transport rate structure, mileage band data are not necessary to facilitate our review of transport rates.

8. As already noted, the transport rate structure has changed since the 1993 TRP was released. In the 1993 annual access tariff filings, the traffic sensitive basket consisted of several service categories, including local transport. Since then, as required by the *First Transport Order*, the LECs restructured local transport services, which had been offered based on an equal charge per minute of traffic.[15] The interim structure adopted in the *First Transport Order* consists of flat-rate charges for entrance facilities, direct-trunked transport, and dedicated-signalling transport, and per-minute charges for tandem-switched transport and the interconnection charge. To accommodate these changes, the Commission created three new service categories in the traffic sensitive basket to replace the local transport category: (1) an aggregated category including entrance facilities, direct-trunked transport, and dedicated signalling transport (collectively referred to as flat-rated transport); (2) tandem-switched transport; and (3) the interconnection charge.

9. In the *Second Transport Order*, the recently created transport categories were moved from the traffic sensitive basket and merged with the special access basket to form a new trunking basket. The Commission also established service categories for the trunking basket. The flat-rated transport DS1, DS3, and voice grade services were merged with the special access DS1, DS3, and voice grade categories. In addition, the Commission modified the density zone pricing system under price caps to accommodate its inclusion in the trunking basket.[16] The charts we now discuss include the modifications to the price cap TRP required by the changes to price cap regulation made by the two *Transport Orders*.

A. Chart IND-1

10. This chart is a modified version of Chart IND-1 in the 1993 TRP. It displays proposed price cap indexes (PCIs), a ctual price indexes (APIs), service band indexes (SBIs), subcategory indexes, and upper and lower bands on the SBIs and subcategory indexes. We have modified IND-1 to be consistent with the new structure of trunking and traffic sensitive services.

B. Chart CCL-1

11. This chart displays the computation for deriving the maximum Carrier Common Line (CCL) rates allowed under price cap regulation. CCL-1 displays base period CCL and Subscriber Line Charge (SLC) demand and rates and computes the maximum CCL rates according to the formula contained in Section 61.46(d) of the Rules.[17] This

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[11] *See* Common Carrier Bureau Solicits Comments Regarding Modifications and Improvements to the Annual Access Tariff Review Plans, DA 93-1450, Public Notice (released December 2, 1993) (*Public Notice*). Comments were filed on January 4, 1994, by American Telephone and Telegraph Company (AT&T), GTE Telephone Operations (GTE), NYNEX Telephone Companies (NYNEX), Southwestern Bell Telephone (Southwestern), and United States Telephone Association (USTA).

[12] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*), *recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *further recon.*, 6 FCC Rcd 4524 (1991), 7 FCC Rcd 5235 (1992), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993). *See generally*, 47 C.F.R. Sections 61.41-61.49.

[13] The RBOCs are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (Southwestern), and U S West Communications, Inc. (U S West).

[14] Price cap LECs must report all data in the price cap TRP, except rates, in full units of measure with zero decimal places. Individual rates must be reported to the number of decimal places reflected in the company's tariffs. In certain cases, the rates reported on Chart RTE-1 may be aggregate rates, *i.e.*, an average of several rates. In those cases, rates should be displayed to six decimal places.

[15] *See Transport Rate Structure and Pricing*, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992) (*First Transport Order*), *recon.*, 8 FCC Rcd 5370 (1993), *further recon.*, FCC 93-403 (released August 18, 1993), *pets. for recon. pending, appeal dismissed sub nom., New England Tel. and Tel. Co. v. FCC*, No. 93-1494 (D.C. Cir. Sept. 7, 1993).

[16] In the TRP comments, several parties advocate updating the TRP to make it consistent with the transport changes. *See* AT&T Comments at 2, NYNEX Comments at 1, Southwestern Comments at 1, and USTA Comments at 2 and Attachment 1. Those comments were filed prior to the release of the *Second Transport Order*. We have incorporated those suggestions contained in the comments except to the extent that the suggestions are rendered moot by the *Second Transport Order*.

[17] *See* 47 C.F.R. § 61.46(d).

level of detail is necessary in order to allow us to verify whether a carrier correctly computed the CCL price cap index.

12. USTA makes two comments concerning Chart CCL-1.[18] First, USTA advocates removing the requirement in Chart CCL-1 for demand data for Lifeline Service. USTA states that those service rates are identical to the rates under Residential End User Common Line and, therefore, Lifeline Service demand data can be aggregated with the Residential End User demand data. We decline to make this change because disaggregated demand data helps us evaluate the accuracy of the LECs' demand data. Second, we incorporate a suggestion made by USTA to display the proposed terminating CCL rate on CCL-1.

13. AT&T recommends that LECs refer to the tariff transmittals in which the maximum allowable rates for terminating and originating premium CCL rates were previously defined.[19] AT&T states that the previous maximums, shown in Lines 160 and 170 of CCL-1, are not referenced elsewhere in the TRP and that a reference would be useful for verifying the calculation of the new maximums. We agree with AT&T and require price cap LECs to note the relevant transmittals.

C. Chart PCI-1

14. This chart, modified to be consistent with the new structure for trunking and traffic sensitive services, displays the data needed to compute, and the computation of, the PCI for the four baskets.[20] It displays, by basket, the following variables used to calculate the PCI: (1) GNP-PI, the Gross National Product Price Index, the measure of inflation; (2) "X," the productivity factor;[21] (3) "Y," the access expense at the last update of the PCI; (4) the change in access expense; (5) the change in exogenous costs; (6) "R," base period revenue; (7) "w," the weighing factor used in computing the PCI; and (8) "g," the growth in minutes per line.[22]

15. USTA and NYNEX comment that the 45 day estimate of GNP-PI will be unavailable at the time the price cap TRP is being prepared.[23] USTA and NYNEX request that the Commission authorize LECs to use the Gross Domestic Product Price Index (GDP-PI) to calculate the price cap indexes, and USTA asks us to make a permanent change to using GDP-PI in the TRP requirements. USTA maintains that the cost of revising data once GNP-PI figures are available could be avoided without loss of accuracy.

16. USTA is asking us to change the price cap rules to use GDP-PI instead of GNP-PI without giving notice and obtaining comment.[24] This is beyond the Bureau's authority. As in the 1993 annual filings, LECs may use growth in the GDP-PI from the fourth quarter of 1992 to the fourth quarter of 1993 in place of the GNP-PI for the April 1, 1994, filings. However, in order to ensure compliance with price cap rules, the April 1, 1994, filings must be revised to reflect the 75-day estimate of the GNP-PI, if it differs from the GDP-PI. This is the same procedure followed in the 1993 annual filings.

D. Chart SUM-1

17. This chart asks LECs to provide base period (calendar year 1993) demand multiplied by current rates and proposed rates, and to calculate the difference between the two, for each basket and service category. We have modified this chart to be consistent with the new structure for trunking and traffic sensitive services.

E. Chart EXG-1

18. This chart, modified since the 1993 TRP, presents supporting data for computation of the exogenous changes used to compute the PCIs. It displays, by basket, cost data on exogenous changes attributable to Telecommunications Relay Service (TRS),[25] Dial Equipment Minutes (DEM) transition, Subscriber Plant Factor (SPF) transition, long term support (LTS) to companies in the NECA common line pool, inside wire (ISW) amortization, reserve deficiency amortization (RDA), excess deferred taxes (EDT), investment tax credit (ITC) amortization, the sharing or low end adjustment based on earnings in calendar 1993, revision and removal of prior-year sharing or low end adjustment, and "other" exogenous changes.

19. Several parties advocate removing or adding columns for certain exogenous changes.[26] AT&T suggests that the "other" column should be disaggregated into specific exogenous costs. AT&T states that disaggregation of the "other" column is necessary to verify the total amount claimed under other exogenous costs. We generally agree with AT&T that disaggregated data are useful for review purposes. However, because the number of additional columns could vary from company to company, we decline to modify Chart EXG-1. LECs claiming more than one type of "other" exogenous cost should disaggregate those costs in their Description and Justification, displaying each row value for each type of exogenous cost included in the "other" column in EXG-1.

20. AT&T recommends that the Commission delete the columns for SPF, DEM, RDA, and ISW. AT&T states that the scheduled changes in the allocation of those costs under Parts 32 and 69 of the Rules have been completed, and the display of those data on the TRP are no longer necessary. USTA supports the removal of the SPF column, and USTA and NYNEX support an additional column for TRS. It is the Bureau's understanding that several companies plan to file exogenous cost changes related to one or more

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[18] *See* USTA Comments at 2 and Attachment 1.

[19] *See* AT&T Comments at 2.

[20] *See generally*, 47 C.F.R. § 61.44.

[21] This must have the value 3.3 percent in the common line, traffic sensitive switched, and trunking baskets, and 3.0 percent in the interexchange basket; or, if the company has chosen the higher productivity factor, 1.0 percentage point higher in each of those baskets. Choice of the higher productivity factor will affect the level at which sharing or low end adjustments occur.

[22] *See* 47 C.F.R. § 61.45(c). Companies must also provide in the workpapers accompanying their filings the detailed data used to compute the value of g, *i.e.*, both carrier common line minutes of use and number of subscriber lines for 1992 and 1993. This numbers for 1992 should match the data filed in Chart RTE-1 in the 1993 TRP, and the numbers for 1993 should match the data filed in Chart RTE-1 of the 1994 TRP.

[23] *See* USTA Comments at 2 and NYNEX Comments at 2.

[24] *See* 47 C.F.R. § 61.44(b) concerning the use of GNP-PI.

[25] *See In the Matter of Telecommunications Relay Services*, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, FCC 93-463 (released September 29, 1993)

[26] *See* AT&T Comments at 2, NYNEX Comments at 1, and USTA Comments at Attachment 1.

of the categories the parties recommend to remove. Therefore, for the 1994 TRP, we are retaining columns for SPF, DEM, RDA, and ISW, in case residual exogenous amounts remain for LECs. We agree that EXG-1 should include a column for TRS, since this is a new category of exogenous cost, and we have incorporated this column into the TRP.

21. AT&T maintains that the LECs should be required to file an exogenous cost change for termination of equal access expenses. This would result in a downward adjustment to PCI levels. In addition, AT&T states that the TRP should be modified to display financial data related to the exogenous change. AT&T states that, in 1985, the Commission required LECs to record certain equal access expenses in a deferred account.[27] LECs were to amortize those costs over an 8-year period ending in 1993. AT&T notes that at the onset of price caps, on January 1, 1991, the unamortized portion of those expenses was reflected in the LECs' initial rates. AT&T submits that the completion of equal access amortization should be treated as an exogenous cost change, and its effect reflected in price cap rates. AT&T asserts that such treatment would be consistent with Commission actions regarding amortization of ISW and RDA. AT&T states that Chart EXG-1 should be modified to include a separate column, titled "Completion of Equal Access Cost Amortization."

22. We decline to adopt AT&T's suggestion to treat as exogenous the completion of amortization of equal access costs. In the *LEC Price Cap Reconsideration Order*, the Commission rejected MCI's suggestion that the termination of equal access cost amortization should be treated exogenously, because the Commission considered equal access costs to be within the control of LECs.[28] Because there is no requirement for price cap LECs to treat completion of amortization of equal access costs as exogenous, AT&T's request would be a substantive change to the price cap rules and is, therefore, beyond the scope of this proceeding.

23. Consistent with the *1993 TRP Order*, EXG-1 includes a column for the current sharing or low end adjustment, and columns for removal and revision of prior-year amounts.[29] The total of the removal and revision columns must reflect earnings reported in the final Form 492 for 1992.[30] Carriers are required to base this year's sharing or low end adjustment on earnings in calendar year 1993. Because calendar year 1993 includes portions of two tariff years, the level of sharing or low end adjustment for the second half of 1993 shall be computed based on the productivity factor chosen in the 1993 annual filing, and the level for the first half of 1993 shall be computed based on the productivity factor in the 1992 annual filing.

24. Carriers must submit their Form 492 for calendar years 1992 and 1993 as part of their cost support material. In addition, carriers must provide full documentation in their workpapers showing the computations of the sharing or low end adjustment amount and of the method used to allocate the amount among the baskets. As in the 1993 annual access filings, carriers shall remove the earnings of services excluded from price cap treatment based on the assumption that these services earned the same rate of return as interstate services.

25. Companies must include additional data in workpapers on exogenous changes for RDA, ISW, EDT, and ITC, sharing or low end adjustment, revision and removal of prior-year sharing or low end adjustment, and exogenous costs displayed in the "other" column. For both ISW and RDA, the companies' data must include, by state and by tariff entity, the expenses in the July 1, 1993 through June 30, 1994 tariff year and the projected expenses for the July 1, 1994 through June 30, 1995 tariff year, the expense difference between the two years, the percent of the expenses allocated to each of the four baskets, and the total expenses allocated to each of the four baskets. For both EDT and ITC, companies must identify, by tariff entity, the total company and interstate amounts for calendar 1993 and for the July 1, 1994 through June 30, 1995 tariff year.

F. Chart RTE-1

26. This chart, modified to reflect the new structure for trunking and traffic sensitive services, displays aggregate data which can be used to compute the actual price indexes (APIs), service band indexes (SBIs), and subindexes. This chart displays base period (calendar year 1993) demand, current and proposed rates, and revenues computed by multiplying the demand by current and proposed rates for the price cap categories. There are also columns to display rates in effect at the time of the last update of the price cap index (PCI), and revenues computed by multiplying the base period demand by rates for the categories. RTE-1 enables us to verify the accuracy of "R", the variable in the PCI formula that equals base period demand multiplied by rates for the price cap basket. The primary rate elements are displayed under each price cap category. This level of aggregation in RTE-1 is necessary to allow rapid, consistent verification of the computation of the indexes across all companies.

27. We incorporate USTA's suggestion and place "N/A" signifying "not applicable" in Columns A, B, C, and D in the Other Common Line Row in RTE-1.[31] LECs do not need to complete these items, because completing these items would potentially involve summing rates across various services and summing varying units of demand measurement.

28. In the *1993 TRP Order*, we required price cap LECs to provide a chart in addition to RTE-1 which gave complete rate element detail, *i.e.*, demand, existing and proposed rates, along with API, SBI, and subindex computations, for every rate element. LECs provided this chart in computerized format. This rate element level of detail helped in our review of the filings when certain companies' indexes did not exactly match the indexes computed from aggregate data. Therefore, we require LECs to file this chart again this year in computerized format.

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[27] *See Petitions for Recovery of Equal Access Costs*, Memorandum Opinion and Order, FCC 85-628, released December 9, 1985, *recon.*, FCC 86-470, released November 5, 1986.

[28] *See LEC Price Cap Reconsideration Order* at paras. 64-67 and ftn.77.

[29] Because "R", the variable in the PCI formula that equals base period demand multiplied by rates, has changed since the 1993 annual access filings, the amount displayed for the removal of the sharing or low end adjustment will not match the original sharing or low end adjustment reported in the 1993 TRP. The amount of the removal should differ from the original sharing or low end adjustment by the percent change in "R" between the 1993 and 1994 annual filings.

[30] Companies should fully describe how they derive any adjustment to the Form 492 rate of return in separate workpapers.

[31] *See* USTA Comments at 2 and Attachment 1.

29. We leave unspecified the exact format for the rate detail charts because each price cap LEC has a different number of rate elements. For each rate element, however, LECs must display the rate element name, an identifying code, if desired, base period demand, current rates, and proposed rates. Aggregate revenue amounts should also be provided so that agreement between this chart and the revenue amounts in RTE-1 can be verified. The different number of rate elements that LECs use prevents us from specifying the row numbers, but each row of this chart should correspond to only one rate element. The rows should reflect the basket and service category sequence used in RTE-1.

30. In addition to the requirements specified above, price cap LECs must include with their cost support materials a list of all currently applicable Part 69 waivers that permit them to file rate elements different from those specified in Part 69 of the Commission's Rules. The list must include the following information: (1) a citation to the Commission or Bureau Order granting the waiver; (2) a brief description of the waiver, including whether any new rate elements were created; and (3) the basket and, if applicable, service category, of each rate element created by the waiver. Price cap LECs must also include with their support materials a separate list of new services that are being incorporated into the APIs for the first time. This list should contain all services introduced as new services under the price cap rules during calendar year 1993. To assist us in verifying carrier compliance with the basket and service category structure established in the *LEC Price Cap Order*, carriers must also display, for each new service listed, the basket and service category to which the new service is assigned.

IV. THE SUPPLEMENTAL TARIFF REVIEW PLAN

31. In this Order, we are adopting a one-time supplemental TRP for price cap LECs. It displays the initial indexes for the trunking basket, as required under the *Second Transport Order*.[32] Chart 1 displays indexes and revenues for the special access and traffic sensitive baskets, immediately preceding the effective date of the *Second Transport Order*. Charts 2 and 3 display the trunking basket indexes immediately after the effective date of the *Second Transport Order*.[33]

32. The trunking basket indexes that will be displayed in the supplemental TRP must be used as the basis of any price cap filings that change rates of services in the trunking or traffic sensitive basket, including changes made as part of the annual access tariff filings.[34] LECs that do not change trunking or traffic sensitive rates prior to the effective date of the annual filings must file this supplemental TRP by April 1, 1994. However, LECs that do change trunking or traffic sensitive rates prior the effective date of the annual filings must file the supplemental TRP at the time they file the revised rates. This will allow the Bureau to verify that trunking and traffic sensitive rates conform to the new indexes. Appendix B of this Order contains the supplemental TRP.

V. TARIFF REVIEW PLANS FOR NON-PRICE CAP COMPANIES

A. Introduction

33. In past TRP Orders, non-price cap companies were divided into Tier 1 companies and Tier 2 companies.[35] There were TRPs for both categories of non-price cap companies. Tier 2 companies were denoted as either Tier 2A or Tier 2B.[36] In the 1994 TRP Order, we are adopting a new classification system, reflecting the different regulatory options available for non-price cap companies as a result of the *Regulatory Reform Order*.[37] LECs that have not filed previously under price cap regulation and do not elect price cap treatment for annual access year 1994 are subject to the requirements of either: (1) Section 61.38 of the Rules (baseline rate-of-return companies);[38] (2) Section 61.39 of the Rules (small telephone companies);[39] or (3) Section 61.50 of the Rules (optional incentive regulation companies).[40] Baseline rate-of-return (ROR) companies must file the ROR TRP included as Appendix C. The requirements for carriers electing to file as small telephone companies are described below as are the requirements for optional incentive regulation (OIR) companies.

B. Baseline ROR Companies

34. Companies that file pursuant to rate of return regulation are baseline ROR companies and are subject to revised filing requirements under the *Regulatory Reform Order*.[41] In past annual access tariff filings, ROR companies that did not elect price caps and did not elect to be treated as small telephone companies were required to file either a Tier 1 TRP or a Tier 2 TRP. Currently, however, all Tier 1 companies that are not NECA pool members file under either price caps or OIR and, therefore, do not need to file a Tier 1 TRP this year. We are therefore not including Tier 1 TRP charts as an appendix to this Order. It is our understanding, however, that several Tier 2 companies will

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[32] *See Second Transport Order* at para. 37.

[33] LECs must complete the computer disk that contains the supplemental TRP, available from the FCC, and file the disk along with a paper copy of the supplemental TRP. The disk contains a computer program that automatically checks LECs' entries on Charts 2 and 3, using the data in Chart 1 and index rules set forth under the *Second Transport Order*. The computer program also flags differences in the LEC and FCC calculations for review.

[34] *See Second Transport Order* at para 37.

[35] *See* note 3, *supra*.

[36] The Bureau in past TRP Orders has distinguished smaller Tier 2 LECs from the larger Tier 2 LECs by applying the definition of small telephone company study areas adopted in the *Small Telephone Company Order*. *See* Regulation of Small Telephone Companies, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811 (1987) (*Small Telephone Company Order*), *on recon*. *See also* 47 C.F.R. §§ 61.39(a) and (b), 69.602. We adopted different cost support requirements for the larger Tier 2 companies and the smaller telephone companies. Small telephone companies, denoted Tier 2B companies, were those companies which were in National Exchange Carrier Association (NECA) Subset 3 and which served 50,000 or fewer access lines. *See* 47 C.F.R. §§ 69.602. All other Tier 2 companies were designated Tier 2A.

[37] *See* Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, 8 FCC Rcd 4545 (1993) (*Regulatory Reform Order*), *on recon*.

[38] *See* 47 C.F.R. § 61.38.

[39] *See* 47 C.F.R. § 61.39.

[40] *See* 47 C.F.R. § 61.50.

[41] *See Regulatory Reform Order* at para. 97.

continue under baseline ROR regulation this year. Because the revised requirements contained in the *Regulatory Reform Order* do not affect the Tier 2 TRP, we are retaining the Tier 2 TRP in much the same form as last year. However, we are renaming the Tier 2 TRP the ROR TRP.

35. Companies filing under baseline ROR regulation are subject to revised filing requirements under the *Regulatory Reform Order*, establishing a biennial filing cycle.[42] Even though baseline ROR companies are required to make an annual access tariff filing only every other year, these companies can choose to file every year. In this Order, we include the ROR TRP for the companies that are making an annual access tariff filling this year.

36. Our requirements in the ROR TRP have been framed to place the smallest possible burden on the small, non-price cap LECs, while allowing us to evaluate adequately the rates filed by those LECs. The ROR TRP is based on the Tier 2 TRP from previous years. It is updated to be consistent with the *First Transport Order*, discussed in Section III, *supra*. Other changes to the ROR TRP include updates to the time periods for the PYCOS and test year. Appendix C of this Order contains the charts for the ROR TRP.

37. In its TRP comments, AT&T suggests that the demand schedules of the TRPs should be modified for all LECs that will file on a biennial basis.[43] AT&T states that the TRPs of those companies should be modified to display two years of historical data, plus two years of projected data. We decline to incorporate AT&T's suggestion because the length of PYCOS period and test year has been determined pursuant to Section 61.38 of the Rules, which requires one year of historical or projected data.[44]

C. Small Telephone Companies

38. Companies that qualify as small telephone companies and elect to file under the small telephone company rules are subject to Section 61.39 of the Rules. It is not necessary for companies filing under the small company rules to submit supporting data at the time of the annual filing. However, the companies should be prepared to submit the data promptly upon reasonable request by the Commission or interested parties.[45]

39. The recently adopted *Regulatory Reform Order* has expanded the small telephone company filing options under Section 61.39 by allowing small telephone companies to file common line rates. We understand that several small telephone companies plan to file common line rates in their 1994 annual access tariff filings.[46] AT&T suggests that companies filing common line rates pursuant to Section 61.39 of the Rules should file cost support based on the common line format in USTA's proposed TRP for optional incentive regulation. We decline to adapt AT&T's suggestion, because small telephone companies are not required to file TRPs.

D. OIR Companies

40. 1994 is the first annual filing in which LECs can elect OIR. It is available to any non-price cap LEC for either its traffic sensitive rates only, or for both its traffic sensitive and common line rates. In comparison to rate of return regulation, OIR relies more on historical costs, broader earnings bands, and greater pricing flexibility.

41. We are unaware of any company that is choosing to file under OIR for the 1994 tariff year. Therefore we are not adopting an OIR TRP at this time. We will continue to work informally with USTA to develop an OIR TRP.[47] Should any carrier wish to file under OIR for the 1994 tariff year, we will provide guidance regarding specific cost support requirements for its filing.

E. Definition of Test Year and Past Year Cost of Service Period

42. The Rules require baseline ROR LECs to submit in support of their proposed rates a past year cost of service (PYCOS) study for the most recent 12-month period.[48] Those LECs are also required to submit a study projecting costs for a representative 12-month period (test year). The Rules also require that rates be targeted to earn the authorized rate of return.[49] All rates for purposes of the ROR TRP must be based upon projections using this test year data. We direct LECs filing the ROR TRP to submit PYCOS data for the period January 1, 1993, through December 31, 1993. We are adopting the period July 1, 1994, through June 30, 1995, as the test year for LECs filing the ROR TRP. As discussed below, NECA is also required to use the same PYCOS period and test year.

43. Under the small company rules, rates are based on historical costs.[50] Small telephone companies may file access tariffs for their traffic sensitive and common line rates every other year, using the following optional cost support and ratemaking methods: (1) a company must compute rates, for the first access filing, based on a cost of service study for all elements for the most recent 12-month period with related demand for the same period, and for subsequent access filings, based on a cost of service study for all elements for the total period since the LEC's last annual access tariff filing, with related demand for the same period; (2) cost support need not be submitted with the filing; and (3) the Commission may require a company to submit such support information at a later date if needed.[51]

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[42] *See Regulatory Reform Order* at para. 97.J

[43] *See* AT&T Comments at 3.

[44] *See* 47 C.F.R. § 61.38(b). Similarly, the lengths of the PYCOS period and test year for companies electing to file under Section 61.39 of the Rules, 47 C.F.R. § 61.39, are set at two year studies in only certain circumstances.

[45] *See* 47 C.F.R. § 61.39(b).

[46] These companies plan to file or have filed for waiver of the Rules. *See* 47 C.F.R. § 69.3(f), which states that companies that file pursuant to Section 61.39 file in odd-numbered years.

[47] In developing the OIR TRP, we will take into account comments regarding the OIR TRP received in response to the *Public Notice*. See, *e.g.*, AT&T Comments at 4.

[48] *See generally*, 47 C.F.R. § 61.38(b).

[49] *See* 47 C.F.R. §§ 69.2(b) and (z).

[50] Some companies that, on their own, would qualify as small telephone companies are not so classified because they are affiliated with companies that are NECA Subset 2 companies or that have study areas of greater than 50,000 access lines. Companies that would be small telephone companies except for such affiliation must use the July 1, 1994 through June 30, 1995 prospective test year and furnish PYCOS data for calendar year 1993.

[51] *See generally*, 47 C.F.R. § 61.39(b).

44. A LEC which chooses optional incentive regulation is required to compute rates, for its first annual access tariff filing pursuant to OIR, based on a cost of service study for the most recent 12-month period with related demand for the same period.

VI. GUIDELINES AND REQUIREMENTS APPLICABLE TO NECA

45. We do not detail specific summary data requirements for NECA in this order. The level of detail required in the ROR TRP should provide guidance to NECA in formulating the summary data for the common line pool that it should include in its filing.

46. As in the past, we do not require that NECA provide a TRP for summary data of small company estimates of costs, except as noted in the paragraph below. The level of detail required by the ROR TRP should provide guidance to NECA in formulating the summary data that it should include as support for these calculations. The fact that we refrain from requiring specific summary data from NECA for its rates and payment amounts does not exempt NECA from providing support data in compliance with Section 61.38 of the Commission's Rules.

47. As in previous annual access filings, we require NECA to provide TRP Chart ERN for the historical and prospective periods; settlements from its average schedule companies in Chart COS-1; and detailed cost support data concerning long term and transitional support calculations.

VII. GENERAL INSTRUCTIONS

48. The following general instructions apply to all non-price cap LECs, and, except as noted, to price cap LECs. Except for Section VII.C, *infra*, the following general instructions also apply to NECA. These requirements pertain to all data filed in support of access charges, including all data that are required in the TRP. All TRP data must be filed no later than April 1, 1994, and must be accurate and complete.

A. Errata

49. Carriers are under a legal obligation to correct any erroneous data discovered in the TRP or other cost support data. Nevertheless, the submission of incorrect cost support data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the original notice period. The rules require that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we require that if such a request is denied, rates supported by the erratum must be refiled with a notice, regardless of whether these rates differ from the rates originally filed. We believe that the special permission requirement is a reasonable means of encouraging carriers to improve the quality of data submitted in the annual access filings. We also believe it facilitates the tariff review process. Exceptions to this rule will only be made upon a showing of good cause.

50. For the 1994 annual access tariff filings, we may specify an early cut-off date for errata. Carriers who discover errors after the cut-off may then be required to refile their tariffs with a later effective date. Any '3 errata that results in a change to the company's TRP should be filed with the latest view of the TRP that was initially filed.

B. Certification

51. The LECs and NECA must certify that their historical and test year data are accurate including a signed statement that the support data are true, correct, and complete to the best of the carrier's knowledge. Certification is required for all data submitted in support of revised rates, including all data that are required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order*[52] and the *1988 TRP Order*. The certification should be displayed as the last page in the binder containing each company's TRP.

C. Geographic Aggregation

52. Except for Charts RTE and ERN for rate of return carriers, all information required by the TRP must be displayed on the same level of geographic aggregation to which the particular LEC's filed rates pertain. Charts RTE and ERN for rate of return carriers must be consistent with the current level of geographic aggregation. In addition, if the tariff rates are based on data from a number of study areas or operating companies, levels of aggregation associated with each study area (state) and operating company should be provided by carriers (except for Charts RTE, ERN, and REV). Price cap carriers need not provide TRP data below or above the level of geographic aggregation to which their proposed rates pertain.

D. Assistance from USTA

53. In order that the Commission and interested parties may evaluate the national impact of revised rates, we request that the USTA Data Reporting Work Group provide us with aggregated data for all price cap LECs (except for those charts and portions of charts for which aggregation is inappropriate) in both hard copy and disk format.[53]

E. Waivers

54. If carriers find that they are unable to provide data required by the TRP, they may file applications for waiver. These waiver applications must demonstrate good cause for reporting a different or lower level of detail than required and must indicate how the carrier intends to comply in the future with the TRP requirements. Carriers are strongly encouraged to comply with the requirements. Omission of individual data items or entries, without request for waiver, is unacceptable. If a carrier determines, however, that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than February 28, 1994. Opposition to applications for waiver shall be filed not later than March 4, 1994. Each carrier requesting any waiver of the requirements of this Order or of any other Commission Rule or Order applicable to the 1994 annual access tariff filings shall include all such re-

[52] *See* Annual 1987 Access Tariff Filings, Petitions for Waivers of Filing Requirements, Mimeo No. 6945 (released Sept. 16, 1986) (*1987 Waiver Order*).

[53] Only Charts IND-1, SUM-1, and RTE-1 need be summed. The portions of chart RTE which report rates and indexes, of course, need not be summed.

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41. We are unaware of any company that is choosing to file under OIR for the 1994 tariff year. Therefore we are not adopting an OIR TRP at this time. We will continue to work informally with USTA to develop an OIR TRP.[47] Should any carrier wish to file under OIR for the 1994 tariff year, we will provide guidance regarding specific cost support requirements for its filing.

E. Definition of Test Year and Past Year Cost of Service Period

42. The Rules require baseline ROR LECs to submit in support of their proposed rates a past year cost of service (PYCOS) study for the most recent 12-month period.[48] Those LECs are also required to submit a study projecting costs for a representative 12-month period (test year). The Rules also require that rates be targeted to earn the authorized rate of return.[49] All rates for purposes of the ROR TRP must be based upon projections using this test year data. We direct LECs filing the ROR TRP to submit PYCOS data for the period January 1, 1993, through December 31, 1993. We are adopting the period July 1, 1994, through June 30, 1995, as the test year for LECs filing the ROR TRP. As discussed below, NECA is also required to use the same PYCOS period and test year.

43. Under the small company rules, rates are based on historical costs.[50] Small telephone companies may file access tariffs for their traffic sensitive and common line rates every other year, using the following optional cost support and ratemaking methods: (1) a company must compute rates, for the first access filing, based on a cost of service study for all elements for the most recent 12-month period with related demand for the same period, and for subsequent access filings, based on a cost of service study for all elements for the total period since the LEC's last annual access tariff filing, with related demand for the same period; (2) cost support need not be submitted with the filing; and (3) the Commission may require a company to submit such support information at a later date if needed.[51]

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[42] *See Regulatory Reform Order* at para. 97.J

[43] *See* AT&T Comments at 3.

[44] *See* 47 C.F.R. § 61.38(b). Similarly, the lengths of the PYCOS period and test year for companies electing to file under Section 61.39 of the Rules, 47 C.F.R. § 61.39, are set at two year studies in only certain circumstances.

[45] *See* 47 C.F.R. § 61.39(b).

[46] These companies plan to file or have filed for waiver of the Rules. *See* 47 C.F.R. § 69.3(f), which states that companies that file pursuant to Section 61.39 file in odd-numbered years.

[47] In developing the OIR TRP, we will take into account comments regarding the OIR TRP received in response to the *Public Notice*. See, *e.g.*, AT&T Comments at 4.

[48] *See generally*, 47 C.F.R. § 61.38(b).

[49] *See* 47 C.F.R. §§ 69.2(b) and (z).

[50] Some companies that, on their own, would qualify as small telephone companies are not so classified because they are affiliated with companies that are NECA Subset 2 companies or that have study areas of greater than 50,000 access lines. Companies that would be small telephone companies except for such affiliation must use the July 1, 1994 through June 30, 1995 prospective test year and furnish PYCOS data for calendar year 1993.

[51] *See generally*, 47 C.F.R. § 61.39(b).

44. A LEC which chooses optional incentive regulation is required to compute rates, for its first annual access tariff filing pursuant to OIR, based on a cost of service study for the most recent 12-month period with related demand for the same period.

VI. GUIDELINES AND REQUIREMENTS APPLICABLE TO NECA

45. We do not detail specific summary data requirements for NECA in this order. The level of detail required in the ROR TRP should provide guidance to NECA in formulating the summary data for the common line pool that it should include in its filing.

46. As in the past, we do not require that NECA provide a TRP for summary data of small company estimates of costs, except as noted in the paragraph below. The level of detail required by the ROR TRP should provide guidance to NECA in formulating the summary data that it should include as support for these calculations. The fact that we refrain from requiring specific summary data from NECA for its rates and payment amounts does not exempt NECA from providing support data in compliance with Section 61.38 of the Commission's Rules.

47. As in previous annual access filings, we require NECA to provide TRP Chart ERN for the historical and prospective periods; settlements from its average schedule companies in Chart COS-1; and detailed cost support data concerning long term and transitional support calculations.

VII. GENERAL INSTRUCTIONS

48. The following general instructions apply to all non-price cap LECs, and, except as noted, to price cap LECs. Except for Section VII.C, *infra*, the following general instructions also apply to NECA. These requirements pertain to all data filed in support of access charges, including all data that are required in the TRP. All TRP data must be filed no later than April 1, 1994, and must be accurate and complete.

A. Errata

49. Carriers are under a legal obligation to correct any erroneous data discovered in the TRP or other cost support data. Nevertheless, the submission of incorrect cost support data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the original notice period. The rules require that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we require that if such a request is denied, rates supported by the erratum must be refiled with a notice, regardless of whether these rates differ from the rates originally filed. We believe that the special permission requirement is a reasonable means of encouraging carriers to improve the quality of data submitted in the annual access filings. We also believe it facilitates the tariff review process. Exceptions to this rule will only be made upon a showing of good cause.

50. For the 1994 annual access tariff filings, we may specify an early cut-off date for errata. Carriers who discover errors after the cut-off may then be required to refile their tariffs with a later effective date. Any '3 errata that results in a change to the company's TRP should be filed with the latest view of the TRP that was initially filed.

B. Certification

51. The LECs and NECA must certify that their historical and test year data are accurate including a signed statement that the support data are true, correct, and complete to the best of the carrier's knowledge. Certification is required for all data submitted in support of revised rates, including all data that are required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order*[52] and the *1988 TRP Order*. The certification should be displayed as the last page in the binder containing each company's TRP.

C. Geographic Aggregation

52. Except for Charts RTE and ERN for rate of return carriers, all information required by the TRP must be displayed on the same level of geographic aggregation to which the particular LEC's filed rates pertain. Charts RTE and ERN for rate of return carriers must be consistent with the current level of geographic aggregation. In addition, if the tariff rates are based on data from a number of study areas or operating companies, levels of aggregation associated with each study area (state) and operating company should be provided by carriers (except for Charts RTE, ERN, and REV). Price cap carriers need not provide TRP data below or above the level of geographic aggregation to which their proposed rates pertain.

D. Assistance from USTA

53. In order that the Commission and interested parties may evaluate the national impact of revised rates, we request that the USTA Data Reporting Work Group provide us with aggregated data for all price cap LECs (except for those charts and portions of charts for which aggregation is inappropriate) in both hard copy and disk format.[53]

E. Waivers

54. If carriers find that they are unable to provide data required by the TRP, they may file applications for waiver. These waiver applications must demonstrate good cause for reporting a different or lower level of detail than required and must indicate how the carrier intends to comply in the future with the TRP requirements. Carriers are strongly encouraged to comply with the requirements. Omission of individual data items or entries, without request for waiver, is unacceptable. If a carrier determines, however, that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than February 28, 1994. Opposition to applications for waiver shall be filed not later than March 4, 1994. Each carrier requesting any waiver of the requirements of this Order or of any other Commission Rule or Order applicable to the 1994 annual access tariff filings shall include all such re-

[52] *See* Annual 1987 Access Tariff Filings, Petitions for Waivers of Filing Requirements, Mimeo No. 6945 (released Sept. 16, 1986) (*1987 Waiver Order*).

[53] Only Charts IND-1, SUM-1, and RTE-1 need be summed. The portions of chart RTE which report rates and indexes, of course, need not be summed.

quests in this single application. Carriers should not delay undertaking development of data required by the 1994 TRP in anticipation that waiver requests will be granted.

F. Technical Requirements

55. As required in the previous TRP, all companies which file a TRP must provide the data in computerized form. Details regarding this technical requirement are provided in the Attachment to this Order.

G. Compliance with the Paperwork Reduction Act

56. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the Office of Management and Budget form number and date on the formats included with this Order. We also note that these TRPs were developed after informal discussions with LECs and other industry representatives and after evaluation of comments filed in response to our *Public Notice*. By adoption of this Order, we are minimizing the burden on the LECs by several means. This Order deletes obsolete requirements and other requirements which have not proved useful. Further, we do not require the filing of some historical data that have been filed in previous years. We note, especially, that we have reduced the number of pages in the price cap TRP by approximately five pages by eliminating the requirement that LECs file mileage band data in Chart RTE-1. These changes lessen the burden compared to the 1993 annual access filings. We continue to require significantly fewer data from the smaller LECs, thereby minimizing the burden of TRP data requirements for these companies.

VIII. CONCLUSION; PROCEDURAL REQUIREMENTS

57. This Order will be sent directly to all carriers that will file their own annual access tariffs on April 1, 1994, and a copy will also be sent to NECA. A copy of the Order and all attachments will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C., 20037. The Commission will publish the text of this Order in the FCC Record. Those parties wishing to obtain copies of Appendices A, B, C, or D can do so through International Transcription Service, Inc. (ITS), the Commission's contractor for public records duplication. The telephone number of ITS is (202) 857-3800 and it is located in the Commission at Room 246, 1919 M Street, N.W., Washington D.C., 20037. Further details regarding the procedures applicable to the April 1, 1994, tariff filings are provided in the Attachment to this Order.

58. Each company should submit its TRP separately from other portions of its tariff filing. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description and Justification. Each TRP should be arranged by study area rather than by chart.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Chief,
Common Carrier Bureau

Before the
Federal Communications Commission FCC 93-484
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Basic Rate Access Service Provided via Integrated Services Digital Network Access Technology	)	
	)	
and	)	CC Docket No. 93-268
	)	
In the Matter of	)	RM 7815
	)	
Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Public Switched Digital Service	)	RM 6147
	)	
and	)	
	)	
Correction of Part 68 Typographical Errors, Clarifications and a Proposal for Part 68 Registration Revocation Procedures	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: October 22, 1993 **Released: November 22, 1993**

Comment Date: January 13, 1994

Reply Comment Date: January 28, 1994

By the Commission:

I. INTRODUCTION

1. By this Notice of Proposed Rulemaking we propose to amend Part 68 of the Commission's Rules and Regulations, 47 C.F.R. Part 68, which governs the terms and conditions for connection of customer-provided terminal equipment to the telephone network. Part 68 is designed to assure consumers, manufacturers and carriers that terminal equipment may be connected to the telephone network

without causing harm.[1] This proceeding was initiated by two petitions for rule-making, one filed by Southwestern Bell Telephone Company and the other by Ameritech Operating Companies, requesting the addition of switched digital services to Part 68.[2] We also propose to add a registration revocation procedure that should greatly enhance our ability to enforce Part 68 and the Telecommunications Trade Act of 1988.[3] Finally, we are also taking this opportunity to propose clarifications to some rules in Part 68.

II. PROPOSALS FOR ISDN & PSDS EQUIPMENT STANDARDS

A. Terminal Equipment for Basic Rate and Primary Rate Access

2. The petition filed by Southwestern Bell Telephone Company (SWB), (RM-7815), requests amendment of Part 68 to include terminal equipment connected to the two-wire Basic Rate Access (BRA) interface and to the Primary Rate Access (PRA) interface provided by the Integrated Services Digital Network (ISDN) access technology. BRA consists of one or two 64 Kbps information channels with a 16 Kbps channel for dialing and network access information. The 1.544 Mbps PRA consists of 23 64 Kbps information channels and the 16 Kbps dialing and network access channel. ISDN has been in a developmental phase during the past decade. In the past three or four years it has been deployed primarily in an experimental mode. The Public Notice of SWB's petition elicited comments by eight parties and reply comments by three.[4] There was overwhelming support for including this service in Part 68 in order to promote rapid exploitation of this technology on a nationwide (and worldwide) basis. In the words of IDCMA:

> The greatest virtue of adopting Part 68 rules for equipment connected to ISDN services is that establishment of a single set of technical standards will articulate the minimum mandatory criteria for connection of CPE [customer premises equipment]

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[1] For a history of Part 68, see Memorandum Opinion and Order, Docket Nos. 19528, 20774 and 21182, 70 FCC 2d 1800 (1979).

[2] Standards for non-switched leased-line digital services were added to Part 68 in Docket 81-216 in 1985 and included 56 Kbps and lower subrate services and the 1.544 Mbps (T-1) service.

[3] The Telecommunications Trade Act of 1988 requires that all telecommunications equipment imported into the U.S. meet FCC rules and regulations.

[4] Comments were filed by American Telephone & Telegraph Co. (AT&T), The Ameritech Operating Companies (Ameritech), The Bell Atlantic Telephone Companies (Bell Atlantic), Independent Data Communications Manufacturers Association (IDCMA), The NYNEX Telephone Companies (NYNEX), Pacific Telesis Group (Pacific), The Southern New England Telephone Company (SNET), and the U.S. West Communications (US West). Reply comments were filed by Independent Data Communications Manufacturers Association (IDCMA), Southwestern Bell Telephone Company (SWBT) and the United States Telephone Association (USTA).

> throughout the country. This will eliminate the serious problem which manufacturers currently encounter, that is, the imposition of differing requirements for the connection of customer-provided equipment to ISDN services.

Thus, we propose for comment technical standards in Part 68 of our rules.

3. AT&T in its comments notes that SWB's petition was limited to the 2-wire ISDN BRA service. ANSI, AT&T says, has also approved performance and compatibility standards for terminal equipment connected to the 4-wire ISDN PRA (1.544 Mbps) interface. The same considerations of encouraging development of ISDN terminal equipment, industry uniformity, and worldwide compatibility of equipment connected to the BRA interface apply equally to PRA interface. Accordingly, AT&T states Part 68 should be amended at this time to provide equipment specifications for both the PRA and BRA interfaces. We agree that it is in the public interest to include AT&T's suggestions for adding ISDN PRA services for comments.

4. AT&T also notes that SWB's petition would add a new Section 68.310(m) to introduce a "longitudinal-to-metallic" (L-M) balance requirement for equipment connected to the ISDN interface. AT&T states that the L-M balance concept was turned down by the Commission in previous rulemakings in favor of the "metallic-to-longitudinal" (M-L) balance methodology currently in the rules.[5] As AT&T points out, the L-M methodology is considered to be a performance measure, and this is not a primary concern of Part 68. We note that longitudinal balance is a technical measure of crosstalk interference that terminal equipment may induce in cables running to the central office. An M-L longitudinal balance requirement squarely addresses crosstalk which is a harm to the network and thus within Part 68's purview. We also note that Canada's CS-03 network protection standard (equivalent to Part 68) specifies the same M-L longitudinal balance requirement for ISDN BRA and PRA that is currently specified in Part 68's Section 68.310(l). Thus, we propose that new rules reflect a metallic-to-longitudinal requirement.

5. AT&T also recommends that Section 68.308(h)(2) should be amended to apply its limitations on encoded analog content to PRA terminal equipment, comparable to the limitations SWB suggested in Section 68.308(h)(3) for BRA terminal equipment. Also, AT&T recommends that the signaling interface requirements in Section 68.314(d)(2) should also apply to ISDN terminal equipment, in that ISDN equipment has the same potential for signaling interference as other digital equipment connected to the analog network. The rules we present for comment reflect these recommendations. Finally, AT&T states that through-gain limitations in Section 68.308(b)(5) should be established for ISDN services. We understand that this is a current project for Telecommunication Industry Association's TR-41 Committee, and we anticipate appropriate

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[5] See In the Matter of Petitions Seeking Amendment of Part 68 of the Commission's Rules, Third Report and Order, CC Docket No. 81-216, 59 FCC 2d 881, (1985). See also, Memorandum Opinion and Order, CC Docket No. 19528, 58 FCC 2d 716, 729 (1975); Memorandum Opinion and Order, CC Docket No. 19528, 64 FCC 2d 1058, 1068-69 (1977).

recommendations will be provided in this proceeding.

6. The types of plug-jack connectors to be used for ISDN services engendered comment. Ameritech, for example, says that the ANSI standard for BRA proposes an eight-position non-keyed jack in which two positions are reserved for battery, two for power, two for optional features and one each for the tip and ring connections to the service itself. Ameritech says that it offers ISDN BRA via the standard RJ11C jack. (The RJ11C provides connections for two wires, although the jack itself can accommodate up to six wires.) Ameritech says that most ISDN compatible equipment can already accommodate such a connection, and that its companies have no immediate plans to utilize either the battery or the power positions. Therefore, it argues that there is no need to require the eight-position jack. It notes that manufacturers who "build-to" the eight-position interface could provide connection to the type RJ11C through a simple six-position to eight-position double-male adapter. On the other hand, U S West recommends that the jack type SJA-11 (8-position) proposed by the Exchange Carriers Standards Association's T1E1 Technical Subcommittee be approved by the Commission's tariff implementation procedure.[6] We solicit comments on these proposals for ISDN BRA and PRA interface connectors and for suitable connectors for the PSDS service.[7]

(B) Terminal Equipment for Public Switched Digital Service

7. The petition filed by Ameritech, (RM-6147), requests amendment of Part 68 to include terminal equipment that connects to the Public Switched Digital Service (PSDS). The Public Notice of Ameritech's petition elicited comments by two parties and reply comments by two parties.[8] According to Ameritech, PSDS is "a network service that provides a transparent switched digital network service" and supports rates of 56 Kbps or 64 Kbps utilizing time compression multiplexing (TCM) technology. As the result of joint comments by Mountain States Telephone Company, Northwestern Bell Telephone Company and Pacific Northwestern Bell Telephone Company (MNP), equipment standards for a four-wire 56 Kbps service are also included for comments. It is important to note that all three

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[6] See Section 68.104(c) for the Tariff Description alternative.

[7] In late filed comments, the Exchange Carriers Standards Association's T1 Committee offers its recommendations for network connectors for ISDN Basic Rate Access and the Public Switched Digital Services as follows:

For 2-wire ISDN(BRA), connection of a single line: RJ11C.
For 2-wire PSDS, connection of a single line: RJ11C.
For 2-wire ISDN (BRA) and PSDS, connection of multiple lines: RJ21X.
For 4-wire PSDS, connection of a single line: RJ1DC.
For 4-wire PSDS, connection of multiple lines: RJ2DX.

Comments on these recommendations are also requested.

[8] Comments were filed by AT&T and joint comments by MNP. Reply comments were received from Ameritech and IDCMA.

technologies (56 and 64 Kbps time compression and 4-wire 56 Kbps switched services) are call-compatible and a performance and compatibility standard for the three has recently been published by the Telecommunications Industries Association (TIA).[9] The TIA standard identifies PSDS Type I as a 4-wire switched 56 Kbps service. This service utilizes 4-wire 56 Kbps channel service units, which for the most part, have been registered under Part 68 and can be used or readily adapted for use for this class of service.[10] PSDS Type II is a 2-wire switched 56 Kbps device that makes use of TCM technology. PSDS Type II has two modes, an analog mode for switching purposes and a digital information carrier channel. PSDS Type III service is a 64 Kbps full duplex service with an 8 Kbps call setup and switching channel and also uses TCM technology. Although not discussed in the petitions, we note that a new technology known as "inverse multiplexing" or "bandwidth on demand" is being deployed which permits customers to utilize the PSDS and ISDN BRA technologies to order wider bandwidths in multiples of 56 or 64 Kbps. Commenters should address whether inverse multiplexing utilizing n(56/64) Kbps channels, including other bandwidths, such as 128 Kbps and 384 Kbps, require consideration under Part 68.

8. We have included Ameritech's proposal for PSDS Types II and III and also a proposal for PSDS Type I as recommended by MNP. No additional Part 68 requirements are proposed in this notice for PSDS Type I as this equipment is substantially the same as the leased-line versions already in the rules. The pulse templates for PSDS Types II and III, included in Section 68.308(h)(3)(ii), are those proposed by Ameritech and modified by AT&T's comments. We included Ameritech's proposal regarding longitudinal balance requirements for PSDS which includes a correction in longitudinal termination applicable to subrate, 1.544 Mbps (T-1), PSDS, ISDN (PRA & BRA) digital services. AT&T's minor technical and editorial corrections have been included.

III. PART 68 REGISTRATION REVOCATION PROCEDURES

9. In the First Supplemental Notice, released April 3, 1973, 40 FCC 2d 315 at 316 (1973), the Commission outlined the intent of newly proposed Part 68: "Registration would constitute authorization for the equipment to be directly connected to the switched telephone network. However, in appropriate cases, registration could be revoked." However, the Commission's rules do not include Part 68 equipment authorization revocation procedures.[11] The continued

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[9] Network Channel Terminating Equipment of Public Switched Digital Service, EIA/TIA-596, Electronic Industries Association/Telecommunications Industries Association. (This specification covers the 56 Kbps and 64 Kbps time compression multiplexing (TCM) technologies and the 4-wire switched 56 Kbps technology.)

[10] We estimate that approximately 1000 different models of leased-line channel service units have been registered, many of which are already in use for PSDS Type I switched 56 Kbps service. Only a dialing capability has been added.

[11] Although there are provisions in Part 68 which contemplate revocation (i.e., Section 68.202 requires the Commission to maintain lists of equipment for which it has revoked registration, and Section 68.218(c) requires the grantee

authorization of a piece of equipment under Part 68, where that authorization was obtained by fraud, or where continued use of the equipment may be destructive to the telephone network, is not in the public interest. Thus, we propose equipment revocation procedures.

10. We note that sometimes forfeiture penalties alone do not address the issue of the continued viability of equipment registrations which have been obtained by misrepresentation or which do not reflect the specifications of the equipment actually being manufactured. Accordingly, we propose a rule subjecting non-compliant Part 68 registrants to possible revocation of the equipment registration. The proposed rules state that any registrant: (1) who has obtained an equipment registration by misrepresentation, or (2) whose equipment is shown to cause harm to the network, or (3) who willfully or repeatedly failed to comply with the terms of a Part 68 registration, or (4) willfully or repeatedly failed to comply with any of the provisions of the Communications Act of 1934, as amended; or of any rule, regulation or order issued by the Commission under that Act, may be subject to revocation of the Part 68 registration. We believe that such a rule gives registrants notice that non-compliant equipment cannot be sold for connection to the network and that registrations for equipment that may cause harm to the network may be made void.

11. Procedurally, we propose that a Notice of Intent to Revoke Equipment Registration be served upon an apparently non-compliant registrant. The proposed revocation procedures track closely established Commission procedure for Notices of Apparent Liability for assessment of a monetary penalty.[12] A Notice of Intent to Revoke would, inter alia: (1) identify the Commission rule or federal law the registrant apparently violated or failed to comply with, (2) state the nature of the conduct at issue and the date of the occurrence(s), and (3) give notice to the registrant that a registrant whose registration is revoked may not apply for a registration for the same product for a period of six months from the date of the revocation. The prohibition on reapplication for a period of six months after revocation is intended to prevent registrants who violate the rules from simply obtaining a new registration immediately following a revocation. Currently, a Part 68 registration application can be processed and granted by the Commission in approximately 15 days. Effective enforcement of the rules is made difficult if a registrant who has violated the rules can obtain a new registration for the same product only fifteen days after a revocation. We also clarify that revocation of an equipment registration may be imposed in addition to or in lieu of an amount in forfeiture pursuant to Section 1.80 of our rules. Therefore, we propose that a Notice of Intent to Revoke may be served concurrently with and as a part of any Notice of Apparent Liability. In the case of joint Notice of Apparent Liability and Intent to Revoke, Section 1.80 of our rules would govern all procedural issues. Finally, after a respondent has had the opportunity to respond to a Notice of Intent to Revoke, the Commission would

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of an equipment authorization which has been revoked to insure that users of the equipment are notified of the revocation) no procedures are in place to notify registrants of potential revocation and establish a framework for making a revocation determination.

[12] See 47 C.F.R. § 1.80.

issue either a Notice of Revocation or an Order Terminating a Notice of Intent to Revoke. In those cases where there is a material dispute of fact involved, the Commission would, if appropriate, designate the proceeding for hearing before an adminstrative law judge. We seek comments on these proposed procedures.

12. We emphasize that these proposed revocation procedures are in addition to forfeiture penalties which may be assessed pursuant to Section 1.80 of the Commission's rules against any person who repeatedly or willfully violates the Commission's rules.

IV. CLARIFICATION PROPOSALS

13. In addition comments are solicited on the following proposed clarifications:

(a) In Sections 68.2(j) and (k) we propose to eliminate the term "protective circuitry." It appears that such an equipment category is currently not needed, nor will it be needed for implementation of the grandfathering or registration program for ISDN and PSDS.

(b) In Section 68.3, "Definitions", we propose to modify the term, "Test Equipment", to indicate that registration is not required for hand-held data terminals, linesmen's handsets and subscriber line diagnostic equipment used by telephone companies for installation and maintenance of network facilities on the basis that such facilities are outside the scope of Part 68's network protection goal.

(c) In Figure 68.3(a), the maximum voltage value in the associated table is corrected to read 56.5.

(d) In Figure 68.3(g), Note 4, the reference to 59.5 volts is amended to -59.5 volts (with the addition of a minus sign).

(e) In Section 68.104(b), the correct reference is to Section 68.308(b)(4)(i) or (ii).

(f) In Section 68.200 and in Part 2, Subpart L, Section 2.1302, we propose to reduce the number of copies of Part 68 applications to be submitted to an original and one copy from an original and two copies.

(g) In Section 68.200(d) we propose changing the statement that the Office of Engineering and Technology may issue an OET bulletin describing acceptable test methods to "The Common Carrier Bureau will publish a Registration Application Guide with a list of acceptable test procedures; other test procedures may be employed provided they are fully described in the application and are found acceptable by the Commission."

(h) We have had numerous requests to simplify FCC labelling requirements for devices that are too small to display all of the currently required information. Thus, when the device is so small or for such use that it is not practical to place the labelling information on the device itself, we propose a change to §68.300 that would require the FCC Registration Number and the qualifying

device's model number to be displayed on the device and that other information required by that section be provided in the instruction manual. (Country-of-origin is already embedded in the FCC Registration Number.) All letters in the label must be discernible without magnification.

(i) In Section 68.308(i), the second sentence should read, "The pair not under test should be terminated in an impedance of 600 ohms."

(j) In Section 68.308((b)(7)(ii)(C), a table is inserted after the colon, as follows:

	: R2 + RL :	
CONDITION	CLASS B	CLASS C
1	600	1300
2	1800	2500

(k) In Section 68.308(f)(2)(ii), the second line of the table should be corrected to read: 120 kHz to 266 KHz.....

(l) Several parties brought to our attention that in the table in Section 68.310 for items (b), (e), (g) and (i), the 60dB requirement should apply only to the on-hook state and the requirement of 40dB in the on-hook state applies from 1000-4000Hz and in the off-hook state from 200-4000Hz. The table included herein has been revised by TIA subcommittee, TR-41.9, and is submitted for comments.

(m) In Section 68.310(l), the termination impedance for longitudinal balance requirements is corrected to 90 ohms (instead of 500 ohms).

(n) In Section 68.312(b)(2), the reference to "paragraph (a)(1)(v) of this section" should be changed to "paragraph (b)(1)(v) of this section".

(o) In Section 68.312(c)(2), the reference to Section 68.312(a)(2) should be changed to Section 68.312(b)(2).

(p) In Section 68.312(h), the word "tip" in the phrase "shall not tip" should be corrected to "trip" and the word "trip" in the phrase "trip-to-ring" should be corrected to "tip-to-ring".

V. REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

14. Reason for Action. The Commission is issuing a Notice of Proposed Rule Making to provide an opportunity for public comment and to provide a record for Commission decision on the issues stated.

15. Objectives. The objective of this Notice of Proposed Rule Making is to amend Part 68 to include terminal equipment for use with the Integrated Services Digital Network and the Public Switched Digital Services; to correct

typographical errors; to request comments on proposed clarifications; and to develop a registration revocation procedure.

16. Legal Basis. The Communications Act of 1934, as amended, 47 U.S.C. §§151 et seq.

17. Description, potential impact and number of small entities affected. It is likely to increase minimally production costs of some CPE manufacturers.

18. Record keeping requirements. None.

19. Federal rules which overlap, duplicate or conflict with the Commission's proposal. None.

20. Any significant alternatives minimizing impact on small entities and consistent with the stated objective. None.

21. Comments are solicited. We request written comments on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on other issues in the Notice for Proposed Rule Making, but they must have a separate and distinctive heading designating them as responses to this regulatory flexibility analysis. The Secretary shall send a copy of this Notice to the Chief Counsel of Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Analysis Act. 5 U.S.C. §601, et.seq.

VI. PROCEDURAL MATTERS

22. This is a nonrestricted notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

23. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before January 13, 1994 and reply comments on or before January 28, 1994. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting documents with the reference number CC Docket No. 93-268 on each document. If interested parties want each Commissioner to receive a personal copy of comments, interested parties must file an original plus nine copies. Interested parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington, DC. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.) 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202)857-3800.

VII. ORDERING CLAUSES

24. Accordingly, It is Ordered, That, pursuant to Sections 1, 4(i), 4(j), 201-205 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 225 and 403, notice is hereby given of our intent to adopt the rules proposed in Appendix A.

25. It is Further Ordered, That, pursuant to the requirements of Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, the Secretary shall cause a summary of this Notice of Proposed Rulemaking to be published in the Federal Register which shall include a statement describing how members of the public may obtain such copies. The Secretary shall also provide a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

DA 94-46

In the Matter of	)	
	)	
Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Basic Rate Access Service Provided via Integrated Services Digital Network Access Technology	)	
	)	
and	)	CC Docket No. 93-268
	)	
In the Matter of	)	RM-7815
	)	
Petition to Amend Part 68 of the Commission's Rules to Include Terminal Equipment Connected to Public Switched Digital Service	)	RM-6147
	)	
and	)	
	)	
Correction of Part 68 Typographical Errors, Clarifications and a Proposal for Part 68 Registration Revocation Procedures	)	

ERRATA, AND ORDER EXTENDING COMMENT PERIOD

Released: January 12, 1994

1. The following non-substantive corrections are made to the Notice of Proposed Rulemaking in CC Docket 93-268, RM-7815, RM-6147 (FCC 93-484) adopted October 22, 1993 and released November 22, 1993:

Para. 2: in the seventh line, the dialing and network access channel for ISDN PRA should read 64 Kbps (instead of 16 Kbps).

Para. 5: in the fourth line, the word "interface" should read "interference."

Para. 13(i): in the first line, the reference to "Section 68.308(i)" should read "Section 68.310(i)".

Para. 13(n): the phrase "paragraph (b)(1)(v) of this section" should read "paragraph (b)(1)(iv) of this section."

In Appendix A, Figure 68.3(m) and Tables IV(a) and IV(b) were omitted upon publication. A corrected Appendix A is reissued herewith.

2. The date that comments in this proceeding must be received by the Commission is extended from January 13, 1994 to February 10, 1994, and the date for reply comments is extended from January 28, 1994 to February 25, 1994.

3. This errata and extension of time is issued pursuant to authorities contained in 47 U.S.C. §§ 154(i) and 155, and 47 C.F.R. §§ 0.91, 0.201, 0.204 and 0.291.

FEDERAL COMMUNICATIONS COMMISSION

Olga Madruga-Forti

Olga Madruga-Forti
Chief, Domestic Services Branch
Domestic Facilities Division
Common Carrier Bureau

APPENDIX A

Part 2 and part 68 of Chapter 1 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 202, 203, 204, 205, 208, 215, 218, 313, 314, 404, 410, 602 unless otherwise noted.

2. Section 2.1302 is amended by removing the words "two copies" and adding in their place the words "one copy".

PART 68 - CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

1. The authority citation for part 68 is revised to read as follows:

Authority: 47 U.S.C. 151, 154, 155, 201-05, 208, 215, 218, 220, 226, 227, 303, 313, 314, 403, 404, 410, 412, 602.

2. Section 68.2 is amended by revising paragraph (a) introductory text, and adding paragraphs (a)(9), (a)(10), (j) and (k) to read as follows:

§ 68.2 Scope.

(a) General. Except as provided for in paragraphs (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k), the rules and regulations in this part apply to direct connection:

* * * * *

(9) Of all terminal equipment to Public Switched Digital Service (PSDS Type I, II or III).

(10) Of all terminal equipment to the Integrated Services Digital Network (ISDN) Basic Rate Access (BRA) or Primary Rate Access (PRA).

* * * * *

(j) Grandfathered equipment for connection to PSDS (Type I, II or III):

(1) Terminal equipment, including its premises wiring directly connected to PSDS (Type I, II or III) on (grandfather eligibility date), may remain for life without registration, unless subsequently modified.

(2) New installation of terminal equipment, including premises wiring, may be installed up to (register only date) without registration of any terminal equipment involved, provided that the terminal equipment is of a type directly connected to PSDS (Type I, II or III) as of (grandfather eligibility date). This

terminal equipment may remain connected and be reconnected to PSDS (Type I, II or III) for life without registration unless subsequently modified.

(k) Grandfathered equipment for connection to ISDN BRA or PRA:

(1) Terminal equipment, including its premises wiring directly connected to ISDN BRA or PRA on (grandfather eligibility date), may remain connected to ISDN BRA or PRA for life without registration, unless subsequently modified.

(2) New installation of terminal equipment, including premises wiring, may be installed up to (register only date) without registration of any terminal equipment involved, provided that the terminal equipment is of a type directly connected to ISDN BRA or PRA as of (grandfather eligibility date). This terminal equipment may remain connected and be reconnected to ISDN BRA or PRA for life without registration unless subsequently modified.

2. Section 68.3 is amended by adding the following definitions in alphabetical order as they should appear; by revising the definition of "Test equipment"; by removing in the definition of Zero level decoder the words "See Figure 68.3(j)" and adding in their place "See Figure 68.3(l)"; by revising in Figure 68.3(a) (in the schematic titled "LOOP SIMULATOR CIRCUITS") the maximum voltage value in the table for Condition 1 from "Max 52.5" to read "Max 56.5"; by revising Figure 68.3(g) (the schematic titled "AIOD DATA CHANNEL SIMULATOR CIRCUIT") by removing the second sentence from Note 4 and substituting in its place the following: "4. * * * Thus, if the registered terminal equipment provides -42.5 to -56.5 volts, the overall circuit (simulator and PBX AIOD) shall be tested over the range of -39.5 to -59.5 volts."; and by adding new Figure 68.3(m) (reproduced herein) as it should appear.

§ 68.3 Definitions.

As used in this part:

* * * * *

ISDN Basic Rate Interface: A two-wire, full-duplex echo canceler hybrid interface between the terminal equipment and ISDN BRA. The tip and ring leads shall be treated as telephone connections for the purpose of fulfilling registration conditions.

ISDN Primary Rate Interface: A four-wire point of connection between the terminal equipment and 1.544 Mbps ISDN PRA. The tip, ring, Tip-1, and ring-2 leads shall be treated as telephone connections for the purpose of fulfilling registration conditions.

PSDS Type II Analog Mode Loop Simulator Circuit: A circuit simulating the network side of the two-wire telephone connection that is used for testing terminal equipment to be connected to the PSDS Type II loops. Figure 68.3(m) shows the type of circuit required. Other test circuit configurations may be used provided they operate at the same dc voltage and current characteristics and ac impedance characteristics presented in the illustrated circuit. When utilized, the simulator should be operated over the entire range of loop

resistances, and with the indicated voltage limits and polarities. Whenever the loop current is changed, sufficient time shall be allowed for the current to reach a steady-state condition before continuing testing.

Public Switched Digital Service Type I (PSDS Type I): This service functions only in a digital mode. It employs a transmission rate of 56 Kbps on both the transmit and receive pairs to provide a four-wire full duplex digital channel. Signaling is accomplished using bipolar patterns which include bipolar violations.

Public Switched Digital Service Type II (PSDS Type II): This service functions in two modes, analog and digital. Analog signaling procedures are used to perform supervisory and address signaling over the network. After an end-to-end connection is established, the Switched Circuit Data Service Unit (SCDSU) is switched to the digital mode. The time compression multiplexing (TCM) transmission operates at a digital transmission speed of 144 Kbps to provide full-duplex 56 Kbps on the two-wire access line.

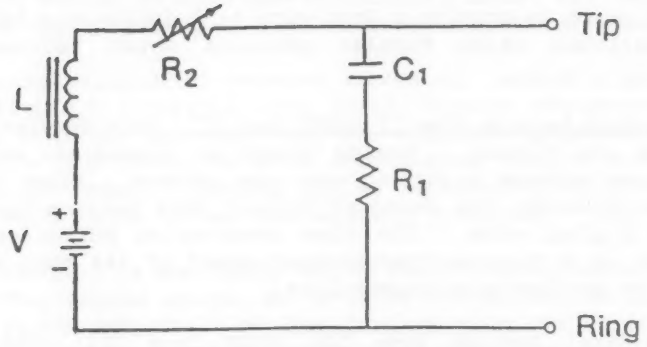
Public Switched Digital Service Type III (PSDS Type III): This service functions only in a digital mode. It uses a time compression multiplexing (TCM) rate of 160 Kbps, over one pair, to provide two full-duplex channels -- an 8 Kbps signaling channel for supervisory and address signaling, and a 64 Kbps user data channel on a two-wire access line.

Switched Circuit Data Service Unit (SCDSU): A CPE device, with PSDS functionality, located between the Network Interface and the data terminal equipment. (It also is sometimes referred to as Network Channel Terminating Equipment.)

* * * * *

Test Equipment: Equipment connected at the customer's premises that is used on the customer's side of the network interfaces: (a) to measure characteristics of the telephone network; or (b) to detect and isolate a communications fault between a terminal equipment entity and the telephone network. Registration is required for test equipment capable of functioning as portable traffic recorders or equipment capable of transmitting or receiving test tones; except registration is not required for devices used by telephone companies solely for network installation and maintenance activities such as hand-held data terminals, linesmen's handsets, and subscriber line diagnostic devices.

* * * * *



L ≥ 10H (Resistance = R_L)
R_1 = 600 Ω ± 1%
C_1 = 500μF, -10%, + 50%

TEST CONDITIONS FOR ANALOG MODE

V (Volts)		R_2+R_L (Ohms)
Min	Max	Continuously Variable
36	46	610 To 1510

Fig. 68.3 (H) SIMULATOR CIRCUIT FOR PSDS IN ANALOG MODE

4. In § 68.104(b), the designation "§ 68.308(a)(4)(i) or (ii)" is removed, and the designation "§ 68.308(b)(4)(i) or (ii)" is added in its place.

5. In § 68.112(b)(2), the word "policy" is removed, and the word "police" is added in its place.

6. In the first sentence of the introductory text of § 68.200, the words "two copies" are removed, and the words "one copy" are added in their place; and § 68.200(d) is revised to read as follows:

Subpart C -- Registration Procedures

§ 68.200 Application for equipment registration.

An original and one copy * * *

* * * * *

(d) A statement that the terminal equipment or protective circuitry complies with and will continue to comply with the rules and regulations in Subpart D of this part, accompanied by such test results, description of test procedures, analyses, evaluations, quality control standards and quality assurance standards as are necessary to demonstrate that such terminal equipment or protective circuitry complies with and will continue to comply with all the applicable rules and regulations in Subpart D of this part. The Common Carrier Bureau will publish a Registration Application Guide with a list of acceptable test procedures; but other test methods may be employed provided they are fully described in the application and are found acceptable by the Commission.

* * * * *

7. In the third line of § 68.208(a), the phrase "of this part of which" is removed, and the phrase "of this part or which" is added in its place.

8. Section 68.211 is added to read as follows:

§ 68.211 Registration revocation procedures.

(a) Cause for revocation. The Commission may revoke the registration of a registrant:

(1) Who has obtained the equipment registration by misrepresentation, or

(2) Whose registered equipment is shown to cause harm to the network, or

(3) Who willfully or repeatedly fails to comply with the terms and conditions of its part 68 registration, or

(4) Who willfully or repeatedly fails to comply with any of the provisions of the Communications Act of 1934, as amended, or of any rule, regulation or order issued by the Commission.

(b) Notice of Intent to Revoke Part 68 Registration. Before revoking a part 68 registration under the provisions of this section, the Commission or its designee will issue a written Notice of Intent to Revoke Part 68 Registration, or Joint Notice of Apparent Liability for Forfeiture and Intent to Revoke Part 68 Registration pursuant to §§ 1.80 and 1.89 of the rules.

(1) Contents of the Notice. The Notice will:

(i) Identify the registration number(s) of the equipment, the rule or federal law apparently violated, and the date(s) involved,

(ii) Set forth the nature of the act or omission charged against the registrant, and the facts upon which such charge is based,

(iii) Specify that in the event of revocation, the registrant may not reapply for registration of the same product for a period of six months, and

(iv) Specify that revocation of the registration may be in addition to or in lieu of an amount in forfeiture pursuant to § 1.80 of the rules.

(c) Delivery. The Notice will be sent via certified mail to the registrant at the address certified in its part 68 application associated with the registration at issue.

(d) Response. The registrant will be afforded a reasonable period of time (usually 30 days from the date of the Notice) to show, in writing, why its part 68 registration should not be revoked or why the forfeiture penalty should not be imposed or should be reduced.

(e) Reapplication. A registrant whose registration has been revoked may not apply for registration of the same product for a period of six months from the date of revocation of the registration.

(f) Reconsideration or appeal. A registrant who is issued a revocation of equipment registration and/or forfeiture assessment may request reconsideration or administrative appeal of the decision pursuant to part 1 of the Commission's rules - Practice and Procedure, 47 C.F.R. part 1.

9. Section 68.300(c) is added to read as follows:

Subpart D - Conditions for Registration

* * * * *

§ 68.300 Labelling requirements.

* * * * *

(c) When the device is so small or for such use that it is not practical to place the labelling information specified in paragraphs (a) and (b), the information required by these paragraphs shall be placed in a prominent place

in user instructions. However, the FCC Registration Number and the device Model Number must be displayed on the device. All lettering on the label must be discernible without magnification.

10. Section 68.308 is amended by revising paragraph (a); adding paragraphs (b)(1)(viii) and (b)(2)(iii); replacing the table labeled "MAXIMUM ALLOWABLE NET AMPLIFICATION BETWEEN PORTS"; adding a table of conditions to paragraph (b)(7)(ii)(C); removing from the table in paragraph (f)(2)(ii) the words "20 kHz" and inserting in their place the words "120 kHz"; revising the first sentence of paragraph (h)(2)(v); and adding paragraphs (h)(3), (h)(3)(i), (h)(3)(ii), (h)(3)(ii)(A), (h)(3)(ii)(B), (h)(4), and Table V to read as follows:

§ 68.308 Signal power limitations.

(a) General. Limitation on signal power shall be met at the interface for all 2-wire network ports, tip and ring conductors to PSDS Types II and III, and, where applicable to services, both transmit and receive pairs of all 4-wire network ports. Signal power measurements will be made using terminations as specified in each of the following limitations. The transmit and receive pairs of 4-wire network ports shall be measured with the pair not under test connected to a termination equivalent to that specified for the pair under test. Through-gain limitations apply only in the direction of transmission to the network.

(b) * * *

(1) * * *

(viii) For PSDS (Types II and III) terminal equipment when in the digital mode of transmission, the maximum equivalent power of any encoded analog signal (other than live voice) shall not exceed -12dBm over any 3-second interval. The equivalent analog power shall be derived by a zero-level decoder located at the network interface to PSDS (Type II or III) facilities.

(2) * * *

(iii) For PSDS (Types II and III) terminal equipment, when in the digital mode of transmission, the maximum equivalent power of any encoded analog signal shall not exceed -3dBm when averaged over a 3-second time interval. The equivalent analog signal shall be derived by a zero-level decoder located at the network interface to PSDS (Types II or III) facilities.

* * * * *

(5) * * *

(i) Registered terminal equipment and registered protective ... that will exceed the following:

MAXIMUM ALLOWABLE NET AMPLIFICATION BETWEEN PORTS (A) (D) (E) (F)

From (F) \ To		Tie Trunk Type Ports (C)					PSDS (I)	OPS Ports (2-Wire) (B)	Public Switched Network Ports (2 Wire)	HCC Digital PBX CO 4 Wire
		2 Wire	4 Wire Lossless	4 Wire CTS	DDS/HCC Digital PBX-Satellite 4-Wire	DDS/HCC Digital PBX-PBX 4-Wire				
Tie Trunk Type Ports (C)	2-W	0dB avg 1.5dB max	0dB avg 1.5dB max	-4dB nom.	0dB avg 1.5dB max	3dB avg 4.5dB max	3dB avg 4.5dB max	-2dB avg -0.5dB max	-	-
	4-W Lossless	0dB avg 1.5dB max	0dB avg 1.5dB max	-4dB nom.	0dB avg 1.5dB max	3dB avg 4.5dB max	3dB avg 4.5dB max	-2dB avg -0.5dB max	-	-
	4-W CTS	-4dB nom.	-4dB nom.	-8dB nom.	-4dB nom.	-1dB nom.	-1dB nom.	-6dB nom.	-	-
	DDS/HCG Digital PBX-Satellite 4-W	0dB avg 1.5dB max	0dB avg 1.5dB max	-4dB nom.	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	-	-
	DDS/HCC Digital PBX-PBX 4-Wire	-3dB avg -1.5dB max	-3dB avg -1.5dB max	-7dB nom.	—	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	-	-
PSDS (I)		-3dB avg -1.5dB max	-3dB avg -1.5dB max	-7dB nom.	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.6dB max	0dB avg 1.5dB max	-	-
RTE (B)		-2dB avg -0.5dB max	-2dB avg -0.5dB max	-6dB nom.	-3dB avg -1.5dB max	-3dB avg -1.5dB max	-3dB avg -1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	-3dB avg -1.5dB max
OPS 2-W (B)		-2dB avg -0.5dB max	-2dB avg -0.5dB max	-6dB nom.	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max	0dB avg 1.5dB max
Public Switch Net 2-W		-	-	-	-	-	-	0dB avg 1.5dB max	-	-
HCC Digital PBX-CO 4-W		-	-	-	-	-	-	0dB avg 1.5dB max	-	-

* * * * *

(7) * * *

(C) Except for ... for the following conditions (see Fig. 68.3(f)):

	: R2 + RL :	
CONDITION	CLASS B	CLASS C
1	600	1300
2	1800	2500

* * * * *

(h) * * *

(2) * * *

(v) Encoded analog content. If registered terminal equipment connected to 1.544 Mbps digital service or to ISDN PRA service contains an analog-to-digital converter, or generates signals in digital form which are intended for eventual conversion to voiceband analog signals, the encoded analog content of the subrate channels of the ISDN information bearing channels within the 1.544 Mbps signal must be limited. * * *

(3) Pulse Repetition Rate. For PSDS (Type II) the pulse repetition rate shall be a maximum of 144,000 pulses per second +/- 5 pulses per second; for PSDS (Type III) the pulse repetition rate shall be a maximum of 160,000 pulses per second +/- 5 pulses per second.

(i) Template for Maximum Output Pulse. When applied to a 135 ohm resistor, the instantaneous amplitude of the largest isolated output pulse obtainable from the registered terminal equipment shall fall within the template of Table IV(A) for PSDS Type II or Table IV(B) for PSDS Type III. The limiting pulse template shall be defined by passing an ideal 50% duty cycle rectangular pulse within the amplitude/pulse rate characteristics of Table IV(A) or Table IV(B) through a 1-pole low-pass filter with a 3dB frequency of 260 kHz.

PULSE CHARACTERISTICS	TABLE IV(A)	TABLE IV(B)
Pulse Height	2.6 volts +/-5%	2.4 volts +/-5%
Pulse Width	3472.2 +/-150ns	3125 +/-100ns
Max Rise or Fall Time (from 10% to 90% points)	100ns	1.2 microsecond +/- 0.2 microsecond

(ii) The registered terminal equipment shall be capable of producing zero (0) patterns of scrambled data bursts as follows:

(A) PSDS Type II Scrambler. Scrambled data bursts shall be produced by applying exclusive OR logic to the sum of the data and spare bits of the burst and each of eight predefined masks. The scrambling masks are a pseudo-random binary sequence 196 bits in length. The 8 scrambling masks are formed from the sequence of 1568 bits generated by the recursion equation:

$$x(s) = x(n-2) \oplus x(n-11)$$

where $\oplus$ represents the OR operation. The initial conditions for the recursion formula are:

x(n-1) = 1	x(n-5) = 0	x(n-9) = 1
x(n-2) = 0	x(n-6) = 1	x(n-10) = 0
x(n-3) = 0	x(n-7) = 1	x(n-11) = 1
x(n-4) = 0	x(n-8) = 0	

(B) PSDS Type III Scrambler: Scrambled data bursts shall be produced by a scrambler that is frame synchronized with start and stop bits. An exclusive OR with pseudo-random bit pattern is applied to 72 bits. This applies to both the transmitted and the received data. Prior to the data being encoded into bipolar form and being transmitted it is fed into one of the inputs of a two-input exclusive OR gate with the bit pattern fed into the second input coming from the pseudo-random generator. The start and stop bits are not passed through the scrambler or descrambler. The bit pattern the generator creates is given in Table V.

(4) Limitations on terminal equipment connected to ISDN BRA. If registered terminal equipment connecting to ISDN BRA services contains a digital-to-analog converter, or generates signals directly in digital form, which are intended for eventual conversion to voiceband analog signals, the encoded analog content of the digital signal must be limited. The maximum equivalent power of the encoded analog signals, other than live voice, as derived by a zero-level decoder test configuration, shall not exceed -12dBm when averaged over a 3-second interval. The maximum equivalent power of encoded analog signals, as derived by a zero-level decoder test configuration, for network control signaling, shall not exceed -3dBm when averaged over any three-second interval.

Table V
PSDS Type III Scrambler Bit Pattern

Bit Count	Value	Bit Count	Value	Bit Count	Value	Bit Count	Value
0	1	19	1	37	0	56	0
1	0	20	1	38	0	57	1
2	1	21	0	39	1	58	0
3	1	22	1	40	1	59	1
4	0	23	1	41	0	60	1
5	1	24	0	42	1	61	0
6	1	25	1	43	1	62	0
7	0	26	0	44	1	63	1
8	0	27	0	45	0	64	1
9	0	28	1	46	1	65	1
10	1	29	1	47	0	66	0
11	0	30	1	48	0	67	0
12	1	31	1	49	0	68	1
13	0	32	0	50	1	69	1
14	0	33	0	51	0	70	0
15	0	34	0	52	0	71	0
16	0	35	0	53	0		
17	0	36	1	54	1		
18	1	37	1	55	1		

11. Section 68.310 is amended by revising the table in paragraph (a), revising the introductory text of paragraph (i), and revising the last sentence of paragraph (l) to read as follows:

Paragraph	Equipment State	Minimum Balance Requirement, dB	Frequency Range, Hz
(b)	On-hook On-hook Off-hook	60 40 40	200 - 1000 1000 - 4000 200 - 4000
(c)	On-hook On-hook Off-hook	60 40 40	200 - 1000 1000 - 4000 200 - 4000
(d)	Off-hook	40	200 - 4000
(e) Voice Equipment	On-hook On-hook Off-hook	60 40 40	200 - 1000 1000 - 4000 200 - 4000
(e) Data Equipment	On-hook On-hook Off-hook	60 40 40	200 - 1000 1000 - 4000 200 - 4000
(f)	Off-hook	40	200 - 4000
(g)	On-hook On-hook Off-hook	60 40 40	200 - 1000 1000 - 4000 200 - 4000
(h)	Off-hook	40	200 - 1000
(i)	On-hook On-hook Off-hook	60 40 40	200 - 1000 1000 - 4000 200 - 4000
(j)	Off-hook	40	200 - 4000

(l) Registered terminal equipment and registered protective circuitry for 4-wire network ports. The pair under ... impedance. The pair not under test shall be terminated in a metallic impedance of 600-ohms.

* * * * *

(l) The maximum ... 1.544 Mbps shall be 100 Ohms plus or minus one percent. The metallic termination used for the longitudinal balance measurements for subrate, ISDN (BRA) and PSDS shall be 135 ohms +/- 1% and for 1.544 Mbps and ISDN (PRA) shall be 100 ohms +/- 1%. The longitudinal termination for these measurements shall be 90 ohms in all cases

* * * * *

12. Section 68.312 is amended by revising the introductory sentence of paragraph (b); revising paragraph (b)(2); removing from paragraph (c)(2) the words "paragraph (a)(2)" and adding in their place the words "paragraph (b)(2)"; and by amending the second sentence of paragraph (h) to read as follows:

§ 68.312 On-hook impedance limitations.

(a) * * *

(b) Limitations on individual equipment intended for operation on loop-start telephone facilities, including PSDS Type II in the analog mode:

* * * * *

(2) Registered terminal equipment and registered protective circuitry intended for use on facilities which will always have ringing detection circuitry in use at the same time such registered terminal equipment and registered protective circuitry is connected need not comply with the 40 kilohm maximum impedance specification of paragraph (b)(1)(iv) of this section.

* * * * *

(h) Limitations ... (DID).

PBX ringing supplies whose output appears on the off-premises interface leads shall not trip when connected to the following tip-to-ring impedance which terminates the off-premises station loop:...

* * * * *

13. Section 68.314 is amended by revising the first sentence of the introductory text of paragraph (a); adding paragraph (a)(3); revising the first sentence of the introductory text of paragraphs (b) and (c); adding paragraph (c)(3); revising paragraph (d)(2); adding paragraph (d)(3); and revising the first sentence of the introductory text of paragraph (f) to read as follows:

§ 68.314 Billing protection.

(a) Call duration requirements on data equipment connected to the public switched network or to tie trunks, or to private lines that access the public switched network, or the PSDS Types I, II or III. * * *

* * * * *

(a)(3) Equipment connected to the PSDS (Types I, II and III). When an incoming PSDS call is answered, both transmission and reception of data shall be prevented for at least 2 seconds after the answering terminal transfers to the off-hook condition. Fixed sequences of signals transmitted and/or received as specified in § 68.314(a)(2) (i through iv) are excluded. These requirements do

not apply to equipment that uses manually activated circuitry to request the switch from analog to digital mode (for PSDS Type II equipment).

(b) Voice and data equipment on-hook signal requirements for equipment connected to the public switched network, or to tie trunks, or to private lines that access the public switched network, or PSDS (Types I, II or III). * * *

* * * * *

(c) Voice and data equipment loop current requirements for equipment connected to the public switched network or to PSDS Type II. * * *

* * * * *

(3) Terminal equipment connected to PSDS Type II shall comply with the requirements of (1) and (2) above, when it enters the analog mode in response to ringing (called party condition), except that the time restriction shall be at least two seconds (instead of five seconds).

(d) * * *

(2) Registered terminal equipment for connection to subrate, 1.544 Mbps, ISDN (BRA or PRA) digital services shall not deliver digital signals to the telephone network with encoded analog content energy in the 2450 to 2750 Hertz band unless an equal amount of encoded analog energy is present in the 800 to 2450 Hertz band.

(3) Terminal equipment connected to PSDS (Types I, II or III) shall not deliver digital signals to the telephone network with encoded analog energy in the 2450 to 2750 Hertz band unless an equal amount of encoded analog energy is present in the 800 to 2450 Hertz band.

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(f) On-hook signal requirements for registered terminal equipment for connection to ISDN (BRA or PRA), subrate or 1.544 Mbps digital services.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94-11

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands	)	CC Docket No. 92-166

NOTICE OF PROPOSED RULEMAKING

Adopted: January 19, 1994 Released: February 18, 1994

Comment Date: May 5, 1994
Reply Comment Date: June 6, 1994

By the Commission: Commissioner Barrett issuing a statement.

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Appendix A
Appendix B

I. INTRODUCTION

1. The Commission is considering several proposals to construct satellite systems that would provide a variety of voice and data mobile satellite services (MSS) in the 1610-1626.5/2483.5-2500 MHz frequency bands (MSS Above 1 GHz Service).[1] This Notice of Proposed Rulemaking proposes rules and policies to govern the service, which we expect to include both domestic and international operations. Operations outside the U.S. will be subject to the regulatory requirements of those countries in which these systems may seek to operate.[2]

2. This new mobile satellite service has the potential to provide not only a variety of new services for users in this country, but also to provide communication services to parts of the world that have previously been grossly underserved. Among the almost limitless applications of the proposed systems are cellular-like mobile services to users anywhere, position location services,

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[1] We recently allocated these frequencies for MSS. See Report and Order, ET Docket No. 92-28, FCC 93-547 (adopted Dec. 13, 1993) (Allocation Order). While we recognize that other MSS systems have been authorized domestically and internationally in other frequency bands above 1 GHz, we will refer to a mobile-satellite service in the 1610-1626.5/2483.5-2500 MHz frequency bands as the "MSS Above 1 GHz Service" in this Notice.

[2] The provision of service outside the United States by U.S. licensees will subject them to other countries' regulatory requirements. Issues relating to the United States' international obligations will be addressed when U.S. licenses have been awarded and the licensees apply to administrations of other countries to provide service outside the United States.

search and rescue communications, disaster management communications, environmental monitoring, paging services, facsimile transmission services, cargo tracking, and industrial monitoring and control.[3] Domestically, this service will help meet the demand for a seamless, nationwide communications system that is available to all and that can offer a wide range of voice and data telecommunication services. In addition to enhancing the competitive market for cellular-like service in those areas served by cellular providers, this new mobile satellite service will offer those Americans in rural areas that are not otherwise linked to the communications infrastructure immediate access to a feature-rich communications network. Low-Earth orbiting (LEO) satellite system configurations can potentially extend these benefits throughout the world, and can provide those countries that have not been able to develop a nationwide communication service an "instant" global telecommunications infrastructure at minimal cost. This network can be used to provide both basic and emergency communications to their entire populations.

3. The service also has a significant potential to stimulate economic growth both in the United States and abroad. A potential multi-billion dollar industry will be enabled, creating opportunities for economic growth in a variety of markets and sub-markets. First, the estimated costs to construct the applicants' space segments range from $97 million to over $2 billion each. The manufacturing costs for the ground segment, which includes both user transceiver units and gateway stations, are expected reach hundreds of millions of dollars more. Thus, manufacturing these systems alone can lead to a substantial investment in the U.S. economy and create a significant number of high-paying jobs in the areas of research and development, production, and administration. As the systems are implemented, additional growth opportunities will be created. One of the applicants, for example, states that it expects that by 2001 the demand for user transceivers will be 1.3 million in the United States and an additional 4.7 million worldwide.[4] This will potentially create a major global industry whose function will be to provide users with mobile units and end services. As demand grows and as markets for these goods and services are developed, additional employment opportunities will be created. Customer costs for the user transceivers, which are estimated at between $200 to $2000 per terminal depending upon its capability,[5] and user service charges will represent a further and continuing investment in the economies of the host countries. Finally, the enhanced communications services offered by this industry will, of themselves, create a broad secondary economic growth potential. Immediate access to an advanced global communications infrastructure can increase the efficiency of existing businesses and create new ones; provide underdeveloped countries with a state-of-the-art communications system that can be used for governmental, educational, personal, and commercial purposes; and contribute to the quality of life which will, in turn, allow for economic development.

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[3] See para. 86, infra, regarding the use of MSS Above 1 GHz for emergency communications.

[4] Application of Motorola Satellite Communications, Inc. at 11.

[5] Id. at 38.

4. The United States has led the world in developing and implementing satellite technology. We expect many of the economic, cultural efficiency and other gains we have seen in the fixed-satellite industry to be reflected in the new mobile satellite industry. The proposals before us represent an opportunity for the United States to continue its leadership role in promoting global development through enhanced communications infrastructures and services. This Notice is a first step in licensing mobile voice systems that can make this enhanced telecommunications network available both in the United States and abroad.

II. BACKGROUND

5. This proceeding was initiated in late 1990, when Ellipsat Corporation (Ellipsat) and Motorola Satellite Communications, Inc. (Motorola) filed applications to construct LEO satellite systems[6] in the 1610-1626.5/2483.5-2500 MHz bands (1.6/2.4 GHz bands) and the 1610-1626.5 MHz band (1.6 GHz band), respectively.[7] These bands are allocated to, among other services, the radiodetermination satellite service (RDSS), which encompasses both satellite radionavigation and radiolocation services.[8] The systems proposed by Ellipsat and Motorola were intended to provide voice and data mobile satellite services in addition to RDSS.[9] These include nationwide near-toll quality two-way voice communications to mobile and fixed users with interconnection to the public switched network, paging services, data/facsimile transmission services, data collection services, tracking and monitoring services, and voice dispatch services.[10] Motorola also indicated that it planned to provide these services on a worldwide basis.

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[6] We use the term "low-Earth orbit satellite system" to describe any system that is not operating in geostationary satellite orbit. This includes systems operating in lower-altitude orbits, medium-altitude orbits, and highly elliptical orbits.

[7] Ellipsat proposed the 1.6 GHz band for Earth-to-space transmissions and the 2.4 GHz band for space-to-Earth transmissions. Motorola proposed to use the 1.6 GHz band for bidirectional transmissions. Motorola later modified its application to request the 1616-1626.5 MHz band only. See Minor Amendment filed by Motorola (Aug. 14, 1992).

[8] See 47 C.F.R. § 2.106. See also discussion at paras. 48-69, infra.

[9] Both Ellipsat and Motorola requested a waiver of the U.S. Table of Frequency Allocations, 47 C.F.R. § 2.1, to permit this non-conforming use of the RDSS bands. These waiver requests have become moot in light of our decision to allocate these bands to MSS on a co-primary basis. See Allocation Order, note 1, supra.

[10] MSS terminals operating in this band will be prohibited from being used on civil aircraft unless the terminal has a direct physical connection to the aircraft Cabin Communication system. See discussion at paras. 55-56, infra.

6. The Commission placed the Ellipsat and Motorola proposals on public notice and established a June 2, 1991 cut-off date for filing applications to be considered concurrently with them.[11] In response, four applications were filed -- three proposing to construct LEO satellite systems[12] and one proposing to add additional frequencies onto an authorized geostationary satellite-orbit (GSO) system.[13] Ellipsat also filed a construction application for a second-generation system. The five LEO proponents request authority to implement a variety of satellite constellations, ranging from Ellipsat's first generation six satellite, single orbit Ellipso system to Motorola's 66 satellite, six orbit Iridium system. Accompanying several of the system proposals were petitions for rulemaking to reallocate the 1.6/2.4 GHz bands for MSS operations domestically on a co-primary basis with other primary services in the band, including RDSS.[14]

7. In February 1992, a co-primary international allocation for MSS was made at the World Administrative Radio Conference (WARC-92).[15] Specifically, the 1610-1626.5 MHz band was allocated on a primary basis for MSS Earth-to-space operations and the 2483.5-2500 MHz band was allocated on a primary basis for MSS space-to-Earth operations. In addition, a secondary allocation was made for MSS space-to-Earth operations in the 1613.8-1626.5 MHz segment of the 1.6 GHz band. Shortly thereafter, the Commission proposed an identical domestic allocation for MSS.[16] In August 1992, we proposed to establish a Negotiated

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11 Public Notice, Report No. DS-1068, 6 FCC Rcd 2083 (1991)(Cut-Off Notice).

12 These applications were filed by Constellation Communications, Inc. (Constellation), Loral Qualcomm Satellite Services, Inc. (LQSS), and TRW, Inc. (TRW).

13 AMSC Subsidiary Corporation (AMSC) filed an application to modify its authorized upper L-band (1545-1559/1646.5-1660.5 MHz) MSS system to include the 1515-1525 MHz and 1616.5-1626.5 MHz frequency bands. The Commission, however, declined to propose to allocate the 1515-1525 MHz band for MSS operations. We stated that MSS operations in this band would interfere with existing aeronautical telemetry operations and would be inconsistent with a U.S. allocation footnote adopted at the WARC-92 international conference. Notice of Proposed Rulemaking and Tentative Decision, ET Docket No. 92-28, 7 FCC Rcd 6414 (1992) (Allocation NPRM), at n.15.

14 "Primary" services have equal rights to operate in particular frequencies. Stations operating in primary services are protected against interference from stations of "secondary" services. Moreover, stations operating in a secondary service cannot claim protection from harmful interference from stations of a primary service. See 47 C.F.R. §§ 2.104(d) and 2.105(c).

15 See International Telecommunication Union, Final Acts of the World Administrative Radio Conference (WARC-92), Malaga-Torremolinos (1992).

16 Allocation NPRM, note 13, supra. The proposed allocation was later adopted in Allocation Order, note 1, supra.

Rulemaking Committee pursuant to the Negotiated Rulemaking Act of 1990 [17] that would provide expert advice and recommendations on technical and operational matters related to establishing a mobile satellite service in the 1.6/2.4 MHz bands.[18] We requested comment on this proposal and solicited applications for Committee membership from all parties that would be significantly affected by the outcome of the proceeding.

8. Based on the comments, the Commission decided to proceed with a negotiated rulemaking. In December 1992, we announced the formation of the "MSS Above 1 GHz Negotiated Rulemaking Committee."[19] The Committee's 16 members included representatives of all six pending MSS applicants, other users of the 1.6/2.4 GHz bands and adjacent bands, one potential future MSS applicant, and one potential equipment manufacturer.[20] The Committee's charter was filed with Congress on January 6, 1993, the date of the Committee's initial meeting, and expired by its own terms on April 6, 1993.

9. During its three-month duration, the full Committee or one of its three informal working groups met almost daily. The Committee's work included technical matters relating to compatibility among the proposed MSS systems (inter-system sharing issues), compatibility between MSS and other services in the band or in adjacent bands (inter-service sharing issues), and operations of MSS feeder links[21] and intersatellite links.[22] The Committee reached a consensus with respect to many of these matters and included proposed rules or policies

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17 5 U.S.C. §§ 581 et seq., Pub.L. 101-648 (November 28, 1990).

18 Public Notice, DA 92-1085, 7 FCC Rcd 5241 (1992).

19 Public Notice, Report No. DS-1265, 7 FCC Rcd 8614 (1992).

20 The Committee members included representatives from AMSC, Ellipsat, Motorola, Constellation, TRW, LQSS, the Commission, the Federal Aviation Administration (FAA), the Committee on Radio Frequencies (CORF), the National Aeronautics and Space Administration (NASA), the Wireless Cable Association International, Inc. (Wireless Cable), Rockwell International Corporation (Rockwell), Communications Satellite Corporation (Comsat), the U.S. Army, Aeronautical Radio, Inc. (ARINC), and Celsat, Inc. (Celsat).

21 "Feeder links" are the transmission links between a fixed "gateway" earth station and the satellites. See para. 70, infra.

22 "Intersatellite links" are direct transmission links between in-orbit satellites, with no intervening earth station. See para. 78, infra.

in these areas in its Report to the Commission (Committee Report).[23] The Committee was not, however, able to reach a consensus on several issues. Most significantly, it was not able to develop an inter-system sharing proposal that would allow all proposed systems to be accommodated. Instead, it included two independent attachments discussing this issue in the Committee Report.[24]

10. We find the Committee's recommended rules and policies generally to be in the public interest and, in accordance with the Negotiated Rulemaking Act, these proposals form the basis for the rules we propose in this Notice.[25] With respect to the matters about which the Committee did not reach a consensus or where a representative of an affected interest did not participate, we propose rules where the record has been sufficiently developed and solicit additional comment where it has not.[26]

III. DISCUSSION

A. Licensing Procedure

1. Background

11. The licensing procedure and qualification requirements adopted for a new satellite service depend, to a large extent, upon the technical compatibility of the proposed systems, the amount of bandwidth allocated for the service, and the nature of any existing use of that bandwidth. When possible, we prefer to leave spacecraft design decisions to the space station licensees because the licensees are in a better position to determine how to tailor their

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[23] Report of the MSS Above 1 GHz Negotiated Rulemaking Committee (April 6, 1993). The Negotiated Rulemaking Act defines "consensus" as unanimous concurrence among the interests represented on the Committee, although it permits the Committee to agree to another specified definition. 5 U.S.C. § 582(2). The Committee decided that it would define consensus as unanimous concurrence, but noted that if unanimity could not be reached, the situation would be described in the Committee Report.

[24] See Final Report of the Majority of the Active Participants of Informal Working Group 1 to Above 1 GHz Negotiated Rulemaking Committee, Annex 1/Attachment 1 to Committee Report (Annex 1/Attachment 1), which was supported by AMSC, Celsat, Constellation, Ellipsat, LQSS, and TRW; Report of Motorola on Band Segmentation Sharing to Working Group 1 of the Above 1 GHz Negotiated Rulemaking Committee, Annex 1/Attachment 2 to Committee Report (Annex 1/Attachment 2).

[25] 5 U.S.C. § 583(a)(7).

[26] Pursuant to the Negotiated Rulemaking Act, we are required to use, to the maximum extent possible consistent with our legal obligations, the consensus of the Committee as the basis for the rules we propose for notice and comment. 5 U.S.C. § 583(a)(7). Where the Committee has not reached consensus, we are under no similar obligation. Nevertheless, the Commission indicated that if a consensus was not reached, we would consider majority and minority input.

systems to meet the particular needs of their customer base.[27] Consequently, if the applicants can develop or agree to an engineering solution or sharing scheme by which all proposed systems can be accommodated, we generally adopt this approach if it is otherwise in the public interest.[28] In situations where all applicants' proposed systems cannot be accommodated, however, we must devise a method consistent with the public interest for choosing among them. In such cases, we have, as an initial matter, imposed rigorous financial and technical requirements as a means of ensuring that those granted licenses are, in fact, capable of expeditiously implementing state-of-the-art systems that will serve the public interest, convenience, and necessity.[29] If it is not possible to accommodate all applicants meeting the adopted qualification criteria, a further processing approach must be selected.

12. Here, the applicants have proposed three distinct system architectures -- two for LEO systems and one for a GSO system. The LEO systems proposed by Ellipsat, Constellation, TRW, and LQSS each employ spread spectrum code division multiple access (CDMA) techniques.[30] This architecture would permit multiple LEO and GSO CDMA systems to share the same frequencies when operating under certain technical constraints. The other LEO system architecture is advanced by Motorola. Motorola's system would operate bi-directionally in a portion of the 1.6 GHz band only, using time division/frequency division

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27 See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988) (1988 Domsat Processing Order), at para. 2; see also Domestic Fixed-Satellite Service, 88 FCC 2d 318 (1981).

28 See, e.g., Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Non-Voice, Non-Geostationary Mobile-Satellite Service, CC Docket No. 92-76, 8 FCC Rcd 8450 (1993) (NVNG MSS Order), where the Commission did not propose specific system design requirements for the non-voice non-geostationary (NVNG) MSS because all applicants could be accommodated.

29 See United States v. Storer Broadcasting, 351 U.S. 192 (1956) (Storer Broadcasting). See, e.g., Licensing Space Stations in the Domestic Fixed-Satellite Service, 101 FCC 2d 223 (1985) (1985 Domsat Processing Notice), at paras. 11-12.

30 Spread spectrum CDMA is a digital transmission technique in which the signal occupies a bandwidth larger than that needed to contain the information being transmitted. Because the signal is spread over a wide bandwidth, the power is dispersed and interference potential is reduced. The spreading is accomplished by modulating the signal by a code that is independent of the information data. A synchronized code in the receiver is used to de-spread the signal and recover the information. The spreading and the variation in the code permit a number of users to operate on the same frequency simultaneously without causing harmful interference.

multiple access (FDMA/TDMA) techniques.[31] This system architecture would require each MSS Above 1 GHz system, whether a LEO or a GSO system, to operate on discrete frequency band segments. AMSC proposed to modify its authorized upper L-band GSO satellite to include the capability to operate in the Earth-to-space transmission direction in the 1616.5-1626.5 MHz band. It proposed to use either CDMA or narrowband FDMA access techniques.

13. The Committee's work plan called for it to develop rules that would maximize multiple entry and avoid or resolve mutual exclusivity among the applicants. The Committee could not reach a consensus, however, regarding a method by which the three proposed system architectures could co-exist and all applications could be granted. The Committee also could not agree to any in a series of compromise proposals developed by the FCC Representative and the Committee Facilitator that would have permitted all proposed systems to be licensed with some design modifications.[32] Rather, the four CDMA LEO proponents, AMSC and Celsat concluded that the Commission should mandate a CDMA system architecture, with the systems operating over the entire available bandwidth.[33] In contrast, Motorola argued that band segmentation, with discrete band segments assigned to CDMA and FDMA/TDMA architectures, should be mandated.[34]

14. After the Negotiated Rulemaking was concluded, the LEO applicants, in two new "partial settlement" groups, submitted two sharing proposals they assert would permit all LEO applications to be granted. Both proposals are premised on excluding GSO systems from consideration for licensing in these frequency bands. Both are also premised upon moving GLONASS, the Russian Global Navigation Satellite System now operating in the 1610-1616 MHz band, to frequencies below the allocated MSS bands and dividing the entire 1610-1626.5 MHz band among the five LEO applicants.[35]

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31 TDMA is a transmission technique in which the same frequency band is used by both uplink and downlink transmissions in alternating time slots. FDMA provides multiple discrete channels with different center frequencies.

32 In essence, these proposals divided the available bandwidth among the six applicants, with any unused spectrum reverting to the spectrum pool for reassignment to those licensees implementing their systems. The proposals were included in the Committee Report as Addendum 1, which was submitted by AMSC.

33 See Committee Report, Annex 1/Attachment 1, at i. AMSC and Celsat endorsed this view, although AMSC expressed support for the compromise approach presented by the FCC Representative and Facilitator. See id.

34 See Committee Report, Annex 1/Attachment 2, at 1.

35 See paras. 53-57, infra, for a detailed discussion of the technical incompatibilities between MSS and GLONASS if GLONASS is used for aircraft approach communications.

15. The first proposal was filed by Motorola and LQSS, and was based upon one of the compromise proposals advanced during the negotiated rulemaking.[36] The plan, in essence, assigns spectrum on a "start and cut back" basis. Under the proposal, the first system ready to be launched would be authorized to operate in the entire allocated band. As additional systems become operational, spectrum would be divided among operational systems in proportion to the number launched. The plan would permit CDMA systems to share spectrum and to aggregate frequency assignments.

16. The three other LEO applicants, Constellation, TRW, and Ellipsat, opposed this proposal.[37] They assert that it creates an incentive for licensees of operational systems to delay or block entry by subsequent systems and that it will be extremely difficult to dislodge a licensee from spectrum it is using. They also assert that as long as the amount of spectrum a system will have access to is not known, it will be difficult to arrange financing. The three applicants submitted their own spectrum sharing plan. They state their proposal would permit all LEO applicants to be licensed and would ensure that "each [LEO] applicant has guaranteed access to an amount of usable spectrum ... that will permit it to commence operations and become economically viable."[38] Specifically, the proponents submit that FDMA/TDMA bidirectional systems should be assigned to 4 MHz at 1622.5-1626.5 MHz with 1 MHz at 1621.5-1622.5 held in reserve for FDMA/TDMA system expansion, and that CDMA systems should be assigned to 7.5 MHz of shared spectrum at 1614-1621.5 MHz with 4 MHz at 1610-1614 held in reserve for CDMA system expansion.

17. AMSC states that it strongly disagrees with the LEO applicants' proposals.[39] It asserts that the Commission can grant AMSC's application and those of the other applicants, although it does not provide a specific plan for doing so. AMSC further states that its proposal represents an incremental approach by a company proceeding with implementation of an MSS system and that the Commission should, under these circumstances, provide AMSC with the opportunity to use the requested spectrum.

2. Qualification Requirements

18. While we attempted to forge an agreement all parties found acceptable, any agreement would have required each applicant to make technical modifications to its proposed system that would have reduced the system capacity. Neither we nor the applicants could fashion a compromise that was acceptable to

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[36] See Jointly Filed Comments, submitted by Motorola and LQSS (Oct. 7, 1993).

[37] Response of Constellation, Ellipsat, and TRW to "Jointly Filed Comments" (Oct. 20, 1993).

[38] Joint Spectrum Sharing Proposal, submitted by Constellation, Ellipsat, and TRW (Oct. 8, 1993), at 8-9.

[39] See Letter from Lon C. Levin, Vice President and Regulatory Counsel, AMSC to Kathleen B. Levitz, Acting Chief, Common Carrier Bureau (Dec. 3, 1993).

all. Given this, our threshold qualification requirements for the service will be designed to ensure that those awarded licenses can expeditiously implement state-of-the-art systems that further the public interest. All pending applicants who filed by the cut-off date will be afforded an opportunity to amend their applications to bring them into conformance with the adopted rules.[40] If applicants are unable to meet the basic qualifying criteria, their applications will be dismissed without additional hearing.[41]

a. Technical Qualifications

19. We have traditionally adopted technical requirements for each satellite service that reflect the nature of and entry opportunities for the particular service being licensed. In the domestic fixed-satellite service, for example, we adopted a full frequency reuse requirement for space stations to ensure spectral efficiency when it appeared that most of the available orbital locations had been assigned.[42] Further, we adopted a wide-band spread spectrum CDMA requirement for RDSS systems when it appeared that all proposed RDSS systems could not be accommodated.[43] In doing so, we rejected a proposed FDMA system architecture. We noted that the FDMA architecture, proposed by Omninet Corporation, prevented spectrum sharing and limited multiple entry opportunities. In addition, we noted that Omninet's FDMA system was designed to provide a variety of mobile satellite services and that Omninet had, in fact, filed an identical system proposal in a contemporaneous proceeding to license an MSS system in the upper L-band frequencies.[44] We stated that potentially impairing CDMA RDSS operations by assigning at least half of the bandwidth requested by the CDMA RDSS applicants to an MSS system, as Omninet had suggested, was unwarranted since systems such as Omninet's were being considered for licensing in a separate proceeding. The technical requirements we propose for the MSS Above 1 GHz service are based upon similar concerns.

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40 See Cut-Off Notice, note 11, supra. Celsat did not file a system application by the cut-off date (nor has it yet filed an application). It therefore cannot be considered as part of the current processing group.

41 Storer Broadcasting, note 29, supra.

42 See Licensing of Space Stations in the Domestic Fixed-Satellite Service, 48 Fed. Reg. 40233 (Sept. 6, 1983) (Reduced Orbital Spacing), at para. 69.

43 Amendment of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, 104 FCC 2d 650 (1986)(RDSS Licensing Order), at paras. 14-19.

44 The license in this proceeding was later awarded to a consortium of the pending qualified applicants, American Mobile Satellite Corporation. See Memorandum Opinion, Order and Authorization in Gen. Docket No. 84-1234, 4 FCC Rcd 6041 (1989)(AMSC Authorization Order).

i. Orbit Considerations

20. Five of the six proposals we are considering here request authority to implement LEO satellite systems. These applications represent the world's first commercial voice-capable LEO mobile satellite proposals and, we believe, have the potential to contribute to the domestic and international public interest in manners in which a GSO system may not. First, the Communications Act requires us "to encourage the provision of new technologies and services to the public."[45] The LEO systems reflect a new commercial technology that permits satellites to operate at significantly lower altitudes than those in geostationary-satellite orbit.[46] Consequently, a communications link using a LEO satellite can shorten the transmission time between two earth stations, serving to reduce or eliminate the time delay that may now be present in satellite-delivered telephone service. Lower altitudes also provide additional options for system design. For example, they permit communications at a lower power between the satellite and terrestrial equipment. A LEO satellite is also not confined to an equatorial orbit as is a GSO satellite, enabling the LEO satellite to provide enhanced coverage to areas at higher latitudes, such as Alaska. A GSO system has been previously licensed to provide voice mobile-satellite services in the upper L-band (1545-1559/1646.5-1660.5 MHz) in the United States.[47] Thus, a LEO-only design requirement should provide U.S. customers with maximum access to a new, alternative voice-MSS technology, to the benefit of the public.[48]

21. Further, the inherently global nature of LEO systems may create additional public interest benefits. Because LEO satellites pass over all countries in their orbits around the Earth, they are inherently capable of providing global service.[49] A GSO satellite, in contrast, is fixed relative to a point on Earth and consequently its "footprint" allows only regional service at best. Given this, a LEO industry may be uniquely positioned to foster social

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45 47 U.S.C. § 7.

46 GSO satellites operate 22,300 miles above the Earth's equator. The LEO applicants propose orbits ranging from approximately 475 miles to 6400 miles above the Earth's surface.

47 AMSC Authorization Order, note 44, supra. Its licensee, AMSC, expects to launch its first satellite by the end of 1994. In addition to applying for additional frequencies for its two other authorized, but unconstructed, GSO satellites in this proceeding, AMSC has applied for authority to operate in the lower L-band at 1530-1544/1631.5-1645.5 MHz. AMSC's lower L-band application, and the comments filed in response, will be considered on their merits in a separate proceeding.

48 47 U.S.C. §§ 1,7; Storer Broadcasting, note 29, supra.

49 But see para. 23, infra, for a discussion of the limitations of certain highly elliptical orbits. Of course, LEO operators must meet any national requirements imposed by other countries before they may begin to provide service to that country. See paras. 91-92, infra.

and economic benefits in the United States and throughout the world. For example, the provision of global service by U.S. companies may spur a U.S. presence in the world economy by helping to expand markets for U.S-produced goods and services. It is also possible that if the U.S. can maintain its leadership in developing and implementing LEO technology, U.S. global competitiveness in telecommunications will be significantly enhanced. Further, the efficiency and competitiveness of U.S. businesses may be improved by implementing state-of-the-art facilities that can meet their growing international communications needs. Finally, LEO systems may offer countries unable to participate in state-of-the-art telecommunications development immediate access to a technologically advanced communications infrastructure with only relatively minor incremental costs associated with additional gateways and user transceivers. This offers the potential for revolutionary advances in all areas supported by communications. These areas include, but are not limited to, health care, education, emergency communications from small villages, public safety, routine governmental and civic exchanges, industrial communications and monitoring, and manufacturing.

22. For these reasons, we propose to require MSS systems licensed in the 1610-1626.5/2483.5-2500 MHz bands to operate in non-geostationary orbits, as contained in proposed rule section 25.143(b)(2)(i). We request comment on this proposal from both applicants and potential users. Commenters should discuss in their pleadings the potential for MSS Above 1 GHz systems to generate social, economic, and technical benefits, both domestically and globally, and the extent to which these benefits are realizable with LEO and GSO satellites. Applicants should also indicate with specificity the extent to which their proposed systems will foster these goals. In particular, applicants should describe the services they intend to provide, including, for example, their intended customer base and the manner in which they plan to offer the service. Prospective customers should specify their anticipated use or uses of MSS Above 1 GHz systems, including a discussion of whether equivalent services can be provided by LEO and GSO facilities and whether, and the extent to which, alternative terrestrial services are available.

ii. Global vs. Regional Coverage

23. While LEO systems are inherently capable of providing global service, their effectiveness for doing so varies with their orbital plane. In general, the higher a LEO satellite's orbit, the larger the area on Earth that can be "seen," and therefore served, by that satellite. Thus, a LEO satellite operating at varying altitudes, such as in a highly-elliptical orbit, may "see" a very large area of the Earth when it is at its highest altitude but only a small area of the Earth when it is at its lowest altitudes. This may prevent a LEO satellite constellation operating in a highly elliptical orbit from effectively serving all areas of the world. Given the potential domestic public interest benefits that an expanded U.S. role in the global communications infrastructure may produce, as discussed above, we propose to require each MSS Above 1 GHz applicant to demonstrate that its proposed system is capable of providing service to all areas of the world, with the exception of the polar regions, for at least 75% of every 24 hour period. That is, we propose that satellite systems be designed so that at least one satellite is visible above the horizon at an elevation angle of at least 5° for at least 18 hours each day at latitudes less

than 80°. We request comment on this proposal, which is contained in proposed rule section 25.143(b)(2)(ii).

iii. Continuous Coverage of the Fifty States

24. Consistent with Section 1 of the Act, we also believe it would serve the public interest to ensure that those entities licensed to operate on the limited MSS Above 1 GHz frequencies use those frequencies to provide efficient and ubiquitous service to users throughout the United States. We therefore propose to require each applicant to demonstrate that its proposed system is capable of providing continuous voice services to users throughout the fifty-states. That is, we propose that satellite systems be designed so that at least one satellite is visible above the horizon at an elevation angle of at least 5° at any given time in all areas of the United States.[50] We request comment in this proposal, which is contained in proposed rule section 25.143(b)(2)(iii).

iv. Other Technical Requirements

25. In addition, all applicants will be required to demonstrate compliance with our rules regarding inter-service sharing.[51] We also request comment on whether any other technical requirements are warranted. For example, should we consider adopting a rule that requires MSS Above 1 GHz systems to contain or operate simultaneously in the United States a minimum number of channels for mobile services as a means of achieving maximum efficiency? Commenters should provide concrete justification for each suggested requirement, including an analysis of the perceived public interest benefits.

b. Financial Qualifications

26. In light of the huge costs involved in constructing and launching a satellite system, financial ability has always been considered a significant factor in determining whether an applicant is qualified to hold a license. Historically, the Commission has fashioned financial requirements for satellite services on the basis of entry opportunities in the particular service being licensed. This stems from our repeated experience that licensees without sufficient available resources will likely spend a significant amount of time attempting to raise the financing required to construct and launch a satellite

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50 In proposing this, we recognize that all systems will periodically experience brief outages whenever the transmission signal is blocked by obstructions such as foliage, buildings, or terrain. We also recognize that the transmission signal may be occasionally degraded by propagation phenomena. We emphasize that these unavoidable interruptions do not render the service "non-continuous."

51 See paras. 48-69, infra.

system and these attempts will often end unsuccessfully.[52] Consequently, where a grant to an under-financed space station applicant may preclude a fully capitalized applicant from implementing its plans, and service to the public may be consequently delayed, a stringent financial demonstration has been mandated.[53] Where grant to an under-financed applicant will not prevent another from going forward, the required demonstration is less stringent. For example, in the radiodetermination satellite service, where all applicants could be accommodated with our mandated system architecture and future entry was possible, only a detailed business plan was required.[54] In contrast, in the domestic fixed-satellite service, where applications to implement space stations regularly exceed the number of available orbital locations for those satellites, evidence of full, irrevocable financing is required.[55]

27. The Negotiated Rulemaking Committee could not agree to a method by which all six proposed systems could be licensed. Because a license award to one applicant could consequently preclude another applicant from implementing its system, we must ensure that those applicants that are licensed have the financial ability to proceed promptly. We recognize that the MSS Above 1 GHz service is a new and, as yet, commercially unproven service and that applicants without substantial internal assets may have difficulty obtaining the $97 million to $2 billion in financing they project is needed to construct and launch their space segments. We cannot, however, allow the orbit-spectrum resource to be tied up while these financing efforts are undertaken, with no assurance that they will be fruitful.[56] We therefore propose to adopt the same financial showing that is required in the domestic fixed-satellite service. That is, we propose to require applicants to provide evidence of uncommitted current assets or irrevocably committed debt or equity financing sufficient to meet the estimated

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[52] See, e.g., National Exchange Satellite, Inc., 7 FCC Rcd 1990 (Com. Car. Bur. 1992); Rainbow Satellite, Inc., Mimeo No. 2584 (Com. Car. Bur., released Feb. 14, 1985); United States Satellite Systems, Inc., Mimeo No. 2583 (Com. Car. Bur., released Feb. 14, 1985) (domestic satellite licenses declared null and void for failure to begin implementation as required by license). In addition, Geostar Corporation, a start-up company licensed in the radiodetermination satellite service, declared bankruptcy nearly five years after its licenses were issued. It had not built any of its satellites.

[53] This approach has not prevented smaller firms from participating in the satellite services market because ownership of a space station is not mandatory. Space station capacity can be leased or bought, and earth stations can be acquired at relatively low costs.

[54] RDSS Licensing Order, note 43, supra.

[55] Licensing Space Stations in the Domestic Fixed-Satellite Service, 50 Fed. Reg. 36071 (Sept. 5, 1985) (1985 Domsat Order).

[56] This is in contrast to the NVNG MSS, which is also a new service, but one in which all applicants could be accommodated and future entry appeared possible. See NVNG MSS Order, note 28, supra.

costs of constructing all planned satellites, launching them, and operating the system for the first year.[57]

28. As in the domestic fixed-satellite service, this evidence may be provided through an audited financial statement or balance sheet current for the latest fiscal year or, if the applicant is relying on a credit arrangement or equity placement, through detailed documentation that includes the identity of the creditor or creditors, letters of commitment, all terms of the transaction, including required collateral, and the specifics of any sale or placement of any equity or other form of ownership interest. Further, acceptable credit or equity arrangements must demonstrate that financing has been approved and does not rest on contingencies that require further action by any party to the loan. That is, the instrument of financing must demonstrate that the lender has already determined that the applicant is creditworthy and, absent changed circumstances, is prepared to make the loan immediately upon a license grant by the Commission. Thus, fully negotiated loans that are contingent only upon the borrower obtaining a license would meet our proposed rules. In contrast, loans contingent on further action of the applicant, such as marketing a certain number of transponders on the system or entering into contracts with other parties, will not be considered sufficient, nor will letters from a financier indicating that it has an interest in the project or will assist in arranging financing once a license is granted. The proposed rules are contained in section 25.143(b)(3). We request comment on these proposals.

3. Processing Alternatives

29. Once we determine which applicants are qualified, we must then evaluate whether all qualified applicants can be accommodated in the available spectrum. If so, all may be granted licenses. If not, we must develop a further processing procedure to choose among the competing applications. We previously raised the matter of licensing procedures for the MSS Above 1 GHz service in the Competitive Bidding Implementation Notice.[58] Given the inability of the parties to the Negotiated Rulemaking to reach an agreement that would have permitted all six proposals to be accommodated, we solicited comments in that Notice regarding the possibility of awarding MSS Above 1 GHz licenses through an auction or a lottery. Nevertheless, our preferred processing alternative is to develop a plan to accommodate all qualified applicants. Based primarily upon information that has been filed after the Competitive Bidding Implementation Notice was issued, we believe that this may be possible. If it is not, however, we will need to resort to a further processing mechanism.

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[57] 47 C.F.R. § 25.140. For LEO systems, "first year operational costs" are to be calculated for the year following the launch of the first satellite in the constellation.

[58] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket 93-253, FCC 93-455, 58 FR 53489 (released Oct. 15, 1993) (Competitive Bidding Implementation Notice).

a. Sharing Proposal

30. While a sharing solution could not be developed during the course of the Negotiated Rulemaking, we believe that the recent LEO sharing proposals may form the basis for allowing us to proceed expeditiously with licensing. Both of LEO applicants' proposals appear to allow up to five LEO systems to be accommodated in the 16.5 MHz spectrum allocated to MSS in each transmission direction. This may be sufficient to allow all qualified applicants to be licensed.[59]

31. Our sharing proposal assumes, as do both of the LEO applicants' plans, that CDMA systems may share the same bandwidth and that FDMA/TDMA systems must operate on discrete frequencies. With this assumption, our plan assigns specific frequencies to each of the two technologies. Our proposed spectrum assignments are based upon recent statements made by the LEO applicants regarding their requirements. In the TRW/Constellation/Ellipsat proposal, the three CDMA applicants propose a 7.5 MHz assignment for CDMA systems, with 4 MHz held in reserve for CDMA system expansion. Because LQSS's CDMA system does not appear to have MSS spectrum needs significantly different from the other CDMA applicants' systems, we have assumed that the LQSS system is accommodated under the TRW proposal.[60] Thus, we assume that 11.5 MHz is sufficient to accommodate up to four operational CDMA systems. Motorola's spectrum requirements are based primarily upon a pleading filed by Motorola on August 10, 1993 regarding sharing possibilities. In that pleading, Motorola stated that "if...5.25 MHz were allocated for FDMA/TDMA systems, Motorola could not share its portion of the band with any other FDMA/TDMA system and still have access to enough spectrum to be

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59 We recognize that the interference problems between MSS and certain proposed applications on GLONASS, the Russian Global Navigation Satellite System, would not permit co-frequency co-system coverage in the United States in the 1610-1616 MHz band. See discussion at paras. 53-57, infra. However, as discussed in more detail below, we are encouraged that even if GLONASS is used for these enhanced incompatible operations, the GLONASS system will be moved to frequency bands below 1610 MHz. Accordingly, we will assume, for purposes of MSS Above 1 GHz system licensing, that the entire 1610-1626.5 MHz band will be available for MSS operations, at least in the long term. Nevertheless, we recognize that a GLONASS transition to bands below 1610 MHz may not be completed when the first MSS satellites are launched in the late 1990's. In this case, we would need to develop a transitional plan for MSS migration into the vacated 1610-1616 MHz band, with MSS licensees operating on less than the full amount of their assigned spectrum during the initial phases of their operation.

60 We note that the agreement among the CDMA applicants that was submitted in the Committee Report included LQSS, and has not been withdrawn. See note 33, supra.

economically viable."[61] We infer from this that Motorola could successfully operate on 5.25 MHz of bandwidth and we use this as Motorola's spectral requirement. Indeed, the Motorola/LQSS proposal suggests that as little as 3.3 MHz may be sufficient to accommodate Motorola.[62]

32. By using an 11.5 MHz shared spectrum requirement for CDMA systems and a 5.25 MHz individual system requirement for an FDMA/TDMA system, up to five systems could be accommodated in the allocated 16.5 MHz of bandwidth if each technology were to operate over 1.3% to 1.9% less than the targeted bandwidths. We believe that this small reduction in capacity should not affect any system's ultimate viability. Consequently, we propose to assign CDMA systems to 11.35 MHz of shared bandwidth at 1610-1621.35 MHz and an FDMA/TDMA system to 5.15 MHz of dedicated bandwidth at 1621.35-1626.5 MHz.[63] When a system is launched and ready to begin operating, we will permit it to operate over the entire assigned bandwidth for that technology. Any in-orbit CDMA system will be required to operate compatibly with any newly launched CDMA system. In this manner, we believe we can grant the applications of up to five qualified applicants, which may permit licenses to be awarded without the need for further proceedings.[64]

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61 See "Motorola's Views of the Essential Elements of a Successful Spectrum Sharing Plan for 'BIG LEOS,'" (filed Aug. 10, 1993), at 14 (emphasis added).

62 In the Motorola/LQSS proposal (see para. 15, supra), the proponents assert that "[i]f any MSS/RDSS band sharing plan is to avoid mutual exclusivity while maintaining the economic viability of the proposed systems, it is imperative that the Commission [make] the entire 16.5 MHz of spectrum in the L-band [available] to MSS." At 5. The Motorola/LQSS proposal involves dividing the available spectrum equally among fully operational systems. While the proposal also suggests financial and technical requirements similar to the ones we are proposing, the proponents nowhere indicate that any LEO applicant will be found unqualified. We can infer from this that Motorola believes it could operate in its one-fifth share of the 16.5 MHz available, or 3.3 MHz.

63 Our proposed spectrum sharing plan represents our intended objectives for dividing the 1.6 GHz band for operations covering the U.S. In view of the requirement for international coordination referred to in paras. 91-92, infra, full use of the authorized band in border areas or any overlapping coverage areas of different systems may depend upon agreements with other countries. Moreover, the applicability of the plan outside the U.S. will necessarily depend upon authorizations granted by the countries concerned.

64 Indeed, if a start-up requirement of 7.5 MHz is used for CDMA systems and 3.3 MHz for a FDMA/TDMA system, it may be possible to operate five systems, at least initially, over less than 16.5 MHz of bandwidth. If the 1610-1616 MHz band is not immediately available to MSS Above 1 GHz operators, these initial requirements may be used as the foundation for any interim spectrum sharing plan.

33. While we are optimistic that all licensed systems will be built, we recognize that this may not occur. In the unlikely event that only one CDMA system is implemented, we propose to reduce the bandwidth assigned to that system from 11.35 MHz to 8.25 MHz, even if some of the system's space stations are in-orbit and operating.[65] An 8.25 MHz assignment should be sufficient to implement a viable system and should also provide us with some flexibility when coordinating the system. It may also provide some room for expected growth.[66] We propose to begin to reexamine spectrum assignments one year after licenses are awarded. At that time, all licensees will have been required, by the terms of their licenses, to begin constructing at least the first two satellites in their systems.[67] The licenses of those entities that have not begun construction will be rendered null and void by their own terms. Consequently, if only one CDMA licensee has met its construction commencement milestone, the spectrum assignment for that system -- as the sole licensed CDMA system -- will be automatically adjusted without hearing. If multiple CDMA licensees begin construction as required, as we expect, we will continue to monitor compliance with each licensee's remaining implementation milestones. Should only one CDMA licensee continue to proceed with implementation, we propose to adjust without hearing, any "excess" spectrum assignment to that system.

34. We propose to limit the operations of a single CDMA system to the 1610-1618.25 MHz spectrum segment. The 3.1 MHz of spectrum made available at 1618.25-1621.35 MHz could then be reassigned to an FDMA/TDMA licensee upon a showing of need. If an FDMA/TDMA system licensee has not met its implementation milestones or, if it has, cannot demonstrate the need for additional spectrum, the freed 3.1 MHz of spectrum could be made available to new entrants. Conversely, if an FDMA/TDMA system is the only MSS Above 1 GHz system implemented, the FDMA/TDMA operator would be limited to expanding its operations, upon a demonstration of need, to 8.25 MHz at 1618.25-1626.5 MHz. By limiting individual systems to an 8.25 MHz maximum assignment in this manner, we should be able to consider licensing an additional entity or entities in any unused 8.25 MHz band segment.

35. Our plan does not propose to hold spectrum in reserve for system expansion, as suggested in the TRW/Ellipsat/Constellation proposal. It also does not propose a formula for assigning each system to only a portion of its spectrum until the system becomes fully operational, as suggested in the Motorola/LQSS proposal. Even assuming that all spectrum assigned to MSS Above 1 GHz operators

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65 We propose to include this limitation in each system authorization.

66 While we have recognized the value of allowing room for growth, licensees are cautioned that we would consider cancelling a portion of the assignment if the licensee is not fully using the spectrum. See, e.g, 1985 Domsat Order, note 55, supra, at paras. 23 and 25 (adopting rule assigning existing domestic satellite operators to one additional orbital location in each frequency band as a means of accommodating growth, but noting Commission policy requiring co-location of underutilized in-orbit GSO satellites).

67 See discussion at para. 84, infra, regarding implementation milestones.

can be coordinated internationally, we expect that licensed entities (with the exception of a sole CDMA operator, whose assignment will be adjusted, see above), will be able to make full use of their assigned spectrum -- which is considerably less than initially requested in their applications -- even before their satellite system constellations are completely launched. Once a certain number of satellites are in-orbit, the licensee's spectral needs do not continue to increase as additional satellites are launched and operational. Rather, adding satellites after this number is reached allows the quality of service to be improved over the operating bandwidth, without creating any additional need for spectrum. The operative minimum number of satellites, however, varies from system to system and is based upon several factors, including the altitude and other characteristics of the orbital plane, the proposed system capacity, the traffic demand, and the development of the ground segment. This analysis is complicated further when, as here, multiple systems are to share the same frequencies. In addition to creating potential inequities, a spectrum sharing plan based upon the number or percentage of satellites in-orbit at any given time during a several year launch period when multiple systems are involved would necessitate constant changes to each system's frequency plan and would be exceptionally difficult to administer.

36. Consequently, we propose to authorize a licensee to operate its system over the designated amount of bandwidth for that technology regardless of the number of satellites launched. Licensees are warned, however, that if they do not launch a sufficient number of satellites to allow them to meet the technical requirements for this service (e.g., any requirements we may adopt regarding global coverage and continuous voice service over the United States), by the implementation milestones in their licenses, their system authorizations, by their own terms, will be rendered null and void.[68] As such, the operator will not be licensed to launch or operate additional satellites nor will it be afforded any replacement expectancy for a second generation system. At that time, we may consider adjusting existing spectrum assignments.

37. Finally, our plan includes the 1.6 GHz band only. We assume that CDMA systems assigned to shared 1.6 GHz uplink spectrum will need a corresponding amount of 2.4 GHz downlink spectrum.[69] We recognize, however, that if a bi-directional FDMA/TDMA system is authorized to operate on a portion of the 1.6 GHz band, it will not need downlink spectrum at 2.4 GHz. This would free some spectrum in the 2.4 GHz band and provide us with some flexibility in assigning specific downlink spectrum segments to CDMA licensees. For example, we may decide to avoid licensing in those portions of the 2.4 GHz band that are

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[68] See para. 84, infra.

[69] We request comment on this assumption. Commenters should provide a concrete technical justification for any proposed unequal uplink and downlink spectrum assignments.

especially susceptible to inter-service interference.[70] Thus, while we propose to authorize CDMA operators to share the same amount of downlink spectrum as uplink spectrum, we do not propose specific frequencies for downlink operations at this time. Rather, we propose to consider appropriate downlink frequencies for CDMA systems when those systems are licensed.

38. We request comment on all aspects of our sharing proposal, particularly on whether it may be used as a framework for resolving mutual exclusivity among the qualified applicants. Any applicant asserting that the plan does not provide sufficient capacity for its system must indicate with specificity the minimum spectrum required to support its system, supporting this assertion with a concrete analysis, and must propose a plan that accommodates the reasonable requirements of all qualified applicants.

b. Other Alternatives if Mutual Exclusivity is not Resolved

39. If our spectrum sharing proposal, or some variation of it, is not adopted or does not permit the applications of all qualified applicants to be granted, we must devise a procedure for choosing among the mutually exclusive applications. Possibilities include a comparative hearing, an auction, or a lottery. We briefly discuss the alternatives below, and, to expedite MSS Above 1 GHz licensing, we propose structures for both an auction and a lottery. By doing so, we will be in a position to implement any chosen procedure as quickly as possible should we be unsuccessful in developing a framework that resolves mutual exclusivity.

i. Comparative Hearing

40. If we find we cannot grant licenses to all qualified applicants, we could hold a comparative hearing to attempt to determine which of the qualified applicants' systems best serve the public interest. The Commission's experience with comparative hearings has shown they usually are prolonged. Here, they would not only delay the provision of needed service to the United States public with no certainty that the system ultimately implemented will be superior to one that could have been more expeditiously authorized through another licensing mechanism, but also could also disadvantage the United States in coordinating a licensed system internationally. Without a U.S. licensee with a concrete system proposal, international coordination efforts for a U.S. system could be hindered.[71] Other countries have expressed an interest in implementing mobile satellite systems in these bands and will go forward with the international coordination procedure for their systems regardless of the status of our domestic

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70 See paras. 60-69 for a discussion of the potential interference problems between MSS and other services operating in the 2483.5-2500 MHz band or in adjacent bands.

71 See Tentative Decision, 6 FCC Rcd 4900 (1991) (AMSC Remand Proceeding), at paras. 33-53, for a detailed discussion of the importance of timely participation in the international frequency coordination process with an authorized U.S. licensee.

licensing process.[72] The United States will not be able to participate effectively in those negotiations, and will have difficulty securing sufficient spectrum for U.S. systems, if it cannot present a definitive U.S. proposal in a timely manner. For these reasons, it may not be advisable to hold a comparative hearing. We request comment on this tentative decision.

ii. Auction

41. The Omnibus Reconciliation Act of 1993, Title VI - Communications Licensing and Spectrum Allocations Improvements (Budget Act) gives the Commission the authority to employ competitive bidding procedures to select licensees from among two or more mutually exclusive applicants provided that certain criteria are met.[73] Bidding may apply to a use of the electromagnetic spectrum if we determine that:

> ...the principal use of such spectrum will involve, or is likely to involve, the licensee receiving compensation from subscribers in return for which the licensee (i) enables those subscribers to receive communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate; or (ii) enables those subscribers to transmit directly communications signals utilizing frequencies on which the licensee is licensed to operate...

provided that other statutory objectives are promoted.[74] These include developing and rapidly deploying new technologies, without administrative or judicial delays; promoting economic opportunity and competition and accessibility to the public by disseminating licenses among a wide variety of applicants, including small businesses; recovering for the public a portion of the value of the spectrum; and promoting efficient and intensive use of the spectrum.[75]

42. We believe that if we cannot adopt a plan that will resolve mutual exclusivity among the qualified MSS Above 1 GHz space station applicants, an auction should be considered. MSS Above 1 GHz space station licensees will be providing a commercial subscription-based service that will enable subscribers to transmit or receive MSS transmissions in the frequencies on which the MSS space stations will be licensed to operate. While the statute requires that licensees receive compensation from subscribers in return for enabling those

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72 Germany, Tonga, Canada, France and Inmarsat have advance published plans for both LEO and GSO systems in the 1.6/2.4 GHz bands with the International Telecommunication Union Radiocommunication Bureau (ITU-BR). Feeder link frequencies for MSS systems must be coordinated as well, further complicating the coordination process.

73 47 U.S.C. § 309(j).

74 47 U.S.C. § 309 (j)(2)(A),(B).

75 47 U.S.C. § 309(j)(3).

subscribers to receive and transmit communications signals, we do not believe that this implies that there must be a direct service arrangement between end users and space station licensees. The House Report states that "where the Commission determines that the principal use of the spectrum will be to, in essence, resell the spectrum to subscribers, and [where the objectives of Section 309(j)(3) are met], then that class of licenses should be subject to competitive bidding."[76] Thus, even if particular MSS Above 1 GHz space station licensees provide service to end user subscribers through service vendor resellers, as most applicants have proposed, this should not affect our authority to implement an auction to award licenses for the service. In any event, at least one applicant, Constellation, has represented that it plans to provide some MSS Above 1 GHz service directly to users,[77] and historically, this is the manner in which mobile satellite services have been offered.[78] Further, several of the pending applicants proposing to offer service through resellers have stated that they will receive a specified portion of the subscriber revenues pursuant to their contracts with their resellers.[79] Given the pending proposals and the fact that we do not intend to preclude MSS Above 1 GHz licensees from offering service directly to users, we find that the MSS Above 1 GHz "class of licenses" would fall within even a literal reading of the statute.[80]

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76 H.R. Rep. No. 103-111, 103rd Congress, Second Session, at 253.

77 Constellation Application at 17.

78 RDSS licensee Geostar provided and MSS licensee AMSC is providing end services to users through their own licensed *earth segments, including* mobile user transceivers. AMSC also leases space segment capacity directly to service vendors for resale. See Geostar Corporation, 2 FCC Rcd 1184 (1987); AMSC Subsidiary Corporation, et. al, 7 FCC Rcd 942 (1992); AMSC Subsidiary Corporation, Application File No. 2823-DSE-P/L-93.

79 LQSS, for example, stated in its application that revenues from subscribers would be shared between LQSS and its resellers according to a specified formula. LQSS Application at 44. Ellipsat cited a similar plan, noting that it expected to generate "consolidated revenues" of about $700 per year per subscriber. Ellipsat Application at 34.

80 We do not believe the example provided in the Conference Report to the legislation is to the contrary. The example noted that Instructional Television Fixed Service (ITFS) licensees who lease unused frequencies to Multi-Channel Multipoint Distribution Service (MMDS) operators are not receiving compensation from "subscribers" within the meaning of Section 309(j)(2). See H.R. Rep. No. 103-213, 103rd Congress, First Session, 481-482(1993). In that case, however, the ITFS operator is receiving compensation for a use that is not the "principal use" of the spectrum. In the MSS Above 1 GHz service, in contrast, space station capacity would be sold or leased to resellers to enable them to provide mobile-satellite services to end-users, which is the principal use of the allocated MSS spectrum.

43. Further, conducting an auction to resolve mutual exclusivity among the qualified MSS Above 1 GHz applicants appears to further other public interest objectives advanced by the statute. A competitive bidding system should permit a new service to be more rapidly introduced than would a comparative hearing. It should also allow the public to recover the value of the public spectrum resource being made available for commercial use. Further, it should encourage efficient use of the electromagnetic spectrum. An applicant participating in the bidding process would be forced to develop concrete, comprehensive and realistic business plans in preparing its bids. This analysis should assist in implementating the proposed system and in its ultimate success. An applicant would also bid for only the minimum amount of spectrum needed, encouraging a spectrum efficient design. We recognize that the statute also directs us to promote economic opportunity by disseminating licenses to a wide variety of licensees, including small and minority businesses. We request comment on the manner in which this statutory obligation can be taken into account in auctions for these types of services.

44. While auctions may appear advantageous for the reasons noted above, the approach might have unintended consequences internationally. In particular, other countries may also look to our lead in imposing licensing costs on MSS Above 1 GHz systems. Given the number of countries that may be served by LEO systems, these costs may be considerable. Indeed, they may effectively preclude a U.S.-owned system from serving other countries. It is possible, of course, that these costs may not be significant in countries that seek to ensure that voice mobile satellite services are provided within its borders. Further, applicants will pay no more than that which they determine is consistent with their expected revenues from providing service in that country. Nevertheless, the international nature of LEO service raises concerns that are not applicable to the domestic-only services for which auctions are implemented and we will carefully consider these issues.

45. We envision that if an auction is employed, it will be conducted pursuant to the general framework adopted in the Competitive Bidding Implementation proceeding. We propose here the necessary service specific criteria for the MSS Above 1 GHz service. First, to maximize multiple entry and to encourage applicants to bid only for the minimum amount of spectrum they require, in the event a competitive bidding approach is adopted, we propose to auction the total spectrum allocated for the MSS Above 1 GHz service in discrete frequency blocks.[81] As discussed, it appears possible to implement viable systems over significantly less that the amount of spectrum initially requested by the applicants. Indeed, it appears that as little as 2.0 MHz to 4.0 MHz may provide an individual CDMA system with the same capacity as it would have operating on a shared basis over 11.5 MHz of spectrum in each transmission

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[81] We recognize that there are certain portions of the spectrum in which sharing may be possible among all applicants seeking to use those particular frequencies (i.e., only applicants proposing CDMA systems seek to operate in the 1610-1616 MHz and 2483.5-2500 MHz bands). However, these frequencies cannot in themselves accommodate all proposed CDMA systems. Consequently, they cannot be separated from the rest of the MSS frequencies in determining whether mutual exclusivity exists and whether auctions may be employed.

direction, as advanced in the TRW/Ellipsat/Constellation proposal.[82] Consequently, we propose to auction the spectrum in paired 2.0625 MHz uplink and downlink segments, with eight paired segments available for licensing. To afford licensees some flexibility in designing their systems and to allow for the uncertainties of the international coordination process, we propose to allow applicants to bid successfully on up to four 2.0625 MHz paired segments, for a total of 8.25 MHz of spectrum in each transmission direction. This should provide ample spectrum to support a first-generation MSS Above 1 GHz system, and should provide some flexibility in coordinating the system internationally.[83] It may also provide some room to accommodate growth. Finally, given the CDMA applicants' proposals to share spectrum, we question whether we should permit permittees to agree to do so. That is, if multiple licenses can be awarded for the same band segment, should we permit successful bidders to agree among themselves to implement co-frequency systems? Should we indicate that, in these cases, we will issues licenses permitting operations over this increased bandwidth? We request comment on all aspects of our proposed auction framework.

iii. Lottery

46. Section 309(i) of the Budget Act authorizes the use of a lottery to select from among one or more mutually exclusive applicants if the applications are accepted for filing before July 26, 1993. We tentatively conclude if mutual exclusivity among the qualified applicants cannot be resolved, the statutory requirements for use of a random selection procedure are met. Specifically, a new service is being initiated, resulting in mutually exclusive applications and all applications were accepted for filing before July 26, 1993. Further, a lottery would expedite grant of a license, at least compared with a comparative hearing. This would speed the process of getting service to the public and also would allow the United States to proceed in international coordination activities in a more timely manner. A system licensed through a lottery should be capable of providing fully adequate service to the public.[84]

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82 See discussion at para. 31, supra. We used the proposed channel capacity of each individual CDMA system operating over 16.5 MHz of shared bandwidth to determine the amount of dedicated bandwidth that would be required to support the same number of channels. Compare Table 7, Case 8 of the Committee Report at 5-24 with Table 5 at 5-19. We then extrapolated new dedicated bandwidth requirements that reflect the proportionate values for the 11.5 MHz of shared bandwidth later requested.

83 See para. 33, supra.

84 See Amendment of the Commission's Rules to Allow the Selection From Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 93 FCC 2d 952 (1983), recon. denied, 49 Fed. Reg. 49466 (Dec. 20, 1984). See also Public Mobile Services (Nationwide Paging Service), 57 Rad. Reg. 2d 1416 (1985) (lottery adopted where 16 mutually exclusive applications were filed and differences among the applicants' qualifications were minimal).

47. If a lottery is used to award MSS licenses, we propose to implement it in a manner similar to our proposed auction framework. That is, multiple frequency segments would be offered for a lottery, each with 2.0625 MHz of bandwidth in each transmission direction. All qualified pending applicants would be eligible for selection in each band segment. Further, we propose to limit each applicant to selection in four 2.0625 MHz paired band segments, for a total of 8.25 MHz of bandwidth in each transmission direction.[85] A selectee in more than 8.25 MHz of spectrum would be required to forfeit the extra segments. The band segment or segments to be relinquished will be left to the selectee's discretion. A new lottery for any relinquished segment will be repeated with the remaining applicants. We do not propose to award preferences to lottery applicants. Further, we question whether it may be advisable, as a means of encouraging additional entry, to permit applicants to agree to share spectrum. That is, if multiple licenses can be awarded for the same band segment, should we permit applicants to agree among themselves that they will implement co-frequency systems if one of them is chosen as the tentative selectee, allowing us to award licenses to all qualified applicants in the group? Further, how should we proceed if an applicant is awarded less spectrum than it needs or is awarded spectrum in a portion of the band that it cannot use? Should it be permitted to sell the unusable spectrum to another applicant or selectee? We request comment on all aspects of our proposed framework for a lottery.

B. Interservice Sharing

48. In proposing a co-primary allocation for MSS at 1610-1626.5/2483.5-2500 MHz, the Commission recognized that the MSS will be required to share these bands with other existing services. The 1610-1626.5 MHz band is allocated to the aeronautical radionavigation service on a co-primary basis, and a segment of the band at 1610.6-1613.8 MHz is allocated to the radio astronomy service on a co-primary basis. The 2483.5-2500 MHz band is authorized for co-primary use by the broadcast auxiliary service, by the terrestrial fixed-service, and by industrial, scientific and medical (ISM) equipment. Adjacent bands are allocated to the aeronautical radionavigation-satellite service, the instructional television fixed service (ITFS), and the multi-channel multi-

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[85] We recognize that Motorola's Iridium system, as designed, is capable of operating in only five of the eight uplink segments since only a portion of the 1.6 GHz MSS uplink band is allocated for bidirectional use.

point distribution (MMDS).[86] The Negotiated Rulemaking Committee, which was comprised of MSS applicants and representatives of most, but not all, affected services, extensively studied the issue of interservice sharing. We discuss the Committee's findings below.

1. Radio Astronomy Service:

49. The 1610.6-1613.8 MHz frequency band is allocated to the radio astronomy service (RAS) on a co-primary basis. The service also operates in the 4990-5000 MHz band on a primary basis. The RAS involves the reception of radio waves of cosmic origin,[87] and is responsible for a substantial portion of what has been learned about the universe in the last sixty years. Because the RAS involves only radio reception, it cannot interfere with other services operating in the same frequency band. However, because of its co-primary allocation, the RAS must be protected against unacceptable interference from other services. Achieving this protection is complicated by the nature of cosmic radiation emissions, which are similar to random noise emissions and have extremely low power flux density levels at the Earth. Further, there is a potential for both in-band and out-of-band interference.[88] Nevertheless, because radio astronomy observatories are usually located in remote areas and RAS operations are not always continuous, the Committee was able to reach an agreement by which sharing between MSS and RAS could be accomplished. The Committee's proposal, cooperatively developed by the MSS applicants and CORF,[89] establishes fixed

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[86] See 47 C.F.R. § 2.106. While no dedicated RDSS systems are operating, RDSS remains co-primary in the 1610-1626.5/2483.5-2500 MHz bands. Accordingly, we will leave the RDSS service rules contained in Section 25.141, 47 C.F.R. § 25.141, in place with the clarification that RDSS space station applicants must demonstrate that any proposed system is technically compatible with all authorized MSS Above 1 GHz systems. We further note that while the Commission has permitted interim RDSS operations in the 1610-1626.5 MHz band via packages on GTE Spacenet domestic fixed-satellites, these authorizations require the licensee to terminate transmissions when an MSS Above 1 GHz system licensee launches the first satellite in its system. See Newcomb Communications, Inc., 8 FCC Rcd 3631 (1993); Letter to Counsel, Mobile Data Communications, Inc. from Chief, Domestic Facilities Division (August 19, 1993).

[87] See International Radio Regulations RR 55 and 14.

[88] Out-of-band emissions are transmissions on a frequency or frequencies immediately outside the necessary bandwidth that result from the modulation process. This does not include spurious emissions, which may be reduced without affecting the corresponding transmission of information. See 47 C.F.R. § §2.1.

[89] The Committee on Radio Frequencies (CORF) operates under the auspices of the National Academy of Sciences and is responsible for advancing the interest of radio astronomy in the United States.

radius protection zones around the sixteen radio astronomy sites in the U.S. and sets technical requirements for MSS downlink transmissions.[90]

50. The Committee concluded that in-band interference from the MSS could be avoided by prohibiting Earth-to-space mobile terminal transmissions in the vicinity of RAS sites during times of observation.[91] In determining the necessary size of these zones, the Committee recognized that MSS terminals on-board aircraft could cause interference to RAS sites at distances much greater than land-based MSS terminals. The Committee also recognized that radio astronomy observatories using very long baseline arrays (VLBAs) could operatewith smaller protection zones than those not using VLBAs.[92] The Committee decided that when land-based MSS terminals are involved, fixed, circular protection zones with radii of 160 km and 50 km would generally provide adequate protection for non-VLBA sites and VLBA sites, respectively. The Committee further decided that when MSS terminals on aircraft are involved, protection zones would have to be based on line-of-sight distances. These recommendations are set forth in proposed rule section 25.213(a)(1).

51. The Committee also determined that MSS operations in the 1613.8-1626.5 MHz portion of the band could cause unacceptable out-of-band interference into RAS operations at 1610.6-1613.8 MHz. With respect to MSS uplink operations, the Committee recommended establishing fixed protection zones similar to, but smaller than, those recommended for in-band emissions. These zones would be based upon path loss calculations for each MSS system's relevant operating characteristics, such as frequency plan and out-of-band emission levels. Further, in order to take tropospheric scatter propagation into account, the Committee recommended that the licensees and CORF run model calculations into the 150- to 200-mile range, which is well over the radio horizon. With respect to secondary MSS downlink operations, the Committee made several recommendations. It proposed that downlink frequencies be restricted to a band whose lower edge is separated from the upper edge of the RAS band by a 2.2 MHz guard band, that the downlink emissions be controlled by filtering on

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[90] The Committee also decided that a beacon actuated protection system might provide an alternative to fixed radius protection zones. Under this system, a beacon would transmit a signal when RAS observations were in progress. Upon receipt of this signal, an MSS control center would automatically assign the MSS terminal to a communications channel outside of the shared MSS-RAS frequency band. The Committee concluded, however, that several theoretical and practical concerns must be addressed before a beacon system can be implemented.

[91] This is possible because the RDSS component of the proposed MSS systems allows the location of each mobile terminal to be determined and compared with the designated RAS protection zones.

[92] VLBA observatories use interconnected radio telescopes that are dispersed in widely separated locations. Due to the geographic separation of the telescopes, the chance of correlated interference from any single mobile earth terminal is small. Consequently, a smaller protection zone is possible for these observatories than for observatories using a single radio telescope. Eleven of the 16 radio astronomy sites in the U.S. are VLBA sites.

board the spacecraft and by selectively controlling the number of downlink channels used near the bottom of the band during RAS observations, and that a comprehensive program of analysis and testing be undertaken with the cooperation of the radio astronomy community. The Committee's recommendations are set forth in proposed rule section 25.213(a)(2). Further, in order to ensure that MSS stations can meet the requirements in proposed rule sections 25.213(a)(1) and (a)(2), our proposed rule also includes a requirement that MSS Above 1 GHz systems be capable of determining the position of user transceivers.

52. Finally, the Committee recognized that second harmonic spurious emissions from MSS downlink transmissions in the 2483.5-2500 MHz band could cause unacceptable interference to RAS operations in the 4990-5000 MHz band. It concluded that to protect RAS operations, MSS downlink out-of-band spectral power flux density (spfd) levels should be limited to -241 dB(W/m^2/Hz) in the 4990-5000 MHz band. The Committee noted that this level can be met through proper amplifier device selection and operating conditions in combination with post-amplifier filtering. This recommendation is contained in section 25.213(a)(3) of the proposed rules.

2. Aeronautical Radionavigation Service and Radionavigation-Satellite Service

53. The U.S. Global Positioning System (GPS) operates under the radionavigation-satellite (space-to-Earth) service allocation in the 1565.2-1585.6 MHz bands. GLONASS, the Russian Global Navigation Satellite System, operates under the same service allocation in the 1597-1610 MHz bands. The GLONASS system also operates in the aeronautical radionavigation service allocation in the 1610-1616 MHz band pursuant to International Radio Regulation RR 732.[93] GPS is a space-based positioning, velocity, and time system whose space segment, when fully operational, will be composed of 21 operational satellites in six orbital planes. The GLONASS system will include 21 operational satellites evenly distributed in three orbital planes. The user segment will consist of antennas and receiver-processors that can receive both GPS and GLONASS signals to provide positioning, velocity, and precise timing to the user.

54. Pursuant to international radio regulations, MSS stations may not cause harmful interference to or claim protection from stations operating under RR 732. These MSS stations are also subject to coordination under Resolution 46 (WARC-92). Further, RR 731F provides that MSS earth stations operating with MSS space stations cannot radiate an equivalent isotropically radiated power (e.i.r.p.) density greater than -15 dB(W/4kHz) in that portion of the band used by systems operating in accordance with RR 732.

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[93] RR 732 reserves the 1610-1626.5 MHz band on a worldwide basis for the use and development of air navigation and directly associated ground-based or satellite-borne facilities. It further provides that any satellite use of the band is subject to agreement obtained under the procedures set forth in Article 14 of the International Radio Regulations.

55. In the course of the Negotiated Rulemaking, the FAA indicated that the International Civil Aviation Organization (ICAO) and the U.S. civil aviation community have begun to develop a plan under which they will use GLONASS in conjunction with GPS to provide terminal communications and approach navigation to aircraft.[94] The FAA indicated that this combined system the Global Navigation Satellite System (GNSS), is being considered by these groups as the sole long-term means of aeronautical radionavigation both internationally and in the United States.[95]

56. After extensive study, the Committee concluded that currently operating GLONASS receivers on high altitude aircraft could be protected against interference from MSS systems, but that such protection is not possible using existing technology if GLONASS is used for aircraft approach and terminal communications.[96] Indeed, the Committee asserted that if the aviation community's stated requirements are accepted, the co-primary MSS allocation at 1610-1616 MHz would be effectively nullified because of the disparity between aviation's protection requirements and the e.i.r.p. levels needed to support MSS uplinks. The Committee, which included representatives of the FAA and ARINC, suggested that GLONASS be reconfigured so that it would not operate above 1610 MHz. In the alternative, the Committee suggested that the U.S. GPS system and GPS alternatives be enhanced so that U.S. reliance on GLONASS could be lessened or eliminated.[97] The Committee also recommended that the Commission adopt the uplink e.i.r.p. density limit contained in RR 731E. According to the Committee, this limit is needed to allow the proposed MSS systems to be implemented, although it acknowledged that this limit will not assure protection for GLONASS if GLONASS is used as a component of a "sole means" GNSS.[98] Finally, the Committee recommended that to protect operations of GLONASS receivers and other

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94 The second generation GLONASS system, GLONASS-M, is operating in the 1596.9-1620.6 MHz bands, although it has not yet been successfully coordinated internationally. Rather, it has only been advance published for subsequent international coordination under the procedures of RR Article 14. We believe that we are obligated to protect those GLONASS-M operations in the 1610-1616 MHz band that were previously coordinated for the first-generation GLONASS. Approximately 40 countries, however, including the United States, have submitted comments or objections to the Radiocommunication Bureau (formerly IFRB) with respect to GLONASS-M. In view of this, the Committee agreed that it did not need to consider the potential interference from MSS into uncoordinated GLONASS-M operations.

95 See Committee Report at 15-16.

96 The Committee concluded that secondary MSS downlinks in the 1613.8-1626.5 MHz band would not create any insurmountable interference problems. Conversely, the Committee found that the only example of unacceptable interference from GLONASS into MSS occurred into CDMA uplink channels of geostationary MSS systems operating below 1616 MHz.

97 Committee Report at 19-20.

98 Committee Report at 44.

navigational avionics on-board aircraft, the Commission should prohibit MSS terminals from being used on civil aircraft unless the terminal has a direct physical connection to the aircraft Cabin Communication system.[99]

57. We have initiated both inter-agency and international negotiations regarding MSS and possible "enhanced" GLONASS operations in the 1610-1616 MHz band. We are encouraged that even if the FAA proceeds with its plans to use GLONASS for aircraft approach and terminal communications in the United States, the 1610-1616 MHz band will be available for MSS operations in the United States through a change in the GLONASS frequency plan.[100] The Committee's proposed rules regarding e.i.r.p. limits and limitations on the use of MSS terminals on aircraft fall within accepted international standards and are set forth for comment in proposed rule section 25.213(c).

58. In addition, the Committee found that out-of-band emissions by MSS uplinks in the 1610-1626.5 MHz band could potentially cause interference into GPS operations near 1575 MHz. The Committee stated that sharing was possible, however, if out-of-band emissions on MSS mobile units are constrained. The Committee's specific recommendations are set forth in proposed rule section 25.213(b).[101]

3. Terrestrial Services

59. Several terrestrial services are operating in portions of the frequency bands allocated for MSS or in adjacent bands. These are discussed below.

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[99] The Committee was not able to reach a consensus on out-of-band emission limits needed to protect GLONASS. Rather, it suggested a methodology that could be used to determine these limits, indicating that its suggestions may serve as a basis for further discussion. See Committee Report, Annex 2, Attachment B (Technical Report on MSS/RDSS Sharing with the Aeronautical Radionavigation and Radionavigation-Satellite Service), at 13. We request comment on the proposed methodology and on the appropriate parameters to be used in developing protection criteria.

[100] See, e.g., Letter from Larry Chesto, Chairman, SC-159, Requirements and Technical Concepts for Aviation, to Victor Kuranov, Deputy Director of Scientific Experimental Centre of ATC (June 2, 1993)(recognizing "uncertainty on the future of GLONASS"); Letter from Drs. Nicolay E. Ivanov and Vadim A. Salischev to Larry Chesto (Nov. 4, 1993)(recognizing GLONASS "experiences large difficulties in...coordination [with other primary services] in a bandwidth higher than 1610 MHz...which could probably lead to partial changes in [the] frequency plan of GLONASS.")

[101] The Commission is continuing to discuss the matter of out-of-band emissions from MSS systems to GPS operations with FAA, ARINC, and NTIA. We specifically invite these organizations to comment on our proposed rule.

a. Fixed services in the 2483.5-2500 MHz band

60. Over 700 fixed terrestrial stations, including temporary fixed (transportable) stations, are licensed and operating in the U.S. in the 2483.5-2500 MHz band. These stations are primarily used as links in microwave relay systems serving petroleum companies and as broadcast auxiliary links. Since 1985, however, the Commission has prohibited any further terrestrial licensing in this band.[102]

61. The Committee recognized that MSS spacecraft operating at power flux density (pfd) levels in excess of the levels prescribed by RR 2566 would be required to be coordinated with these "grandfathered" fixed terrestrial stations.[103] It stated, however, that these cases should be infrequent and that, in any event, any interference problems should be resolvable through coordination. The Committee conversely noted that terrestrial operations could interfere with MSS operations, although no analyses were provided to quantify the sharing constraints needed to prevent interference. The Committee stated that because there is no inherent reason why fixed services need to operate in this frequency band, the Commission should consider moving these fixed stations to a higher frequency band.

62. We accept the Committee's finding that interference problems between terrestrial fixed-services at 2483.5-2500 MHz and MSS downlinks operating in excess of the prescribed pfd levels may be settled through the coordination process.[104] We request comment on this assessment. We note, however, that the record was developed without a representative of affected terrestrial operators. We therefore cannot find at this time that the Committee's suggestion that over

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102 Report and Order, Gen. Docket 84-689, FCC 85-388 (released Sept. 13, 1985) (RDSS Allocation Order).

103 RR 2566 specifies pfd values at the Earth's surface that may be produced by space station emissions. The values vary from -152 to -142 dB ($W/m^2/4$ kHz) depending upon the angle of arrival.

104 See RDSS Allocation Order, note 102, supra, at paras. 18-20. In that Order, we recognized that fixed and temporary-fixed operations are unlikely to pose a serious interference threat to RDSS. We therefore grandfathered all existing station licenses as of July 25, 1985, permitting them to continue operations and subject only to license renewal. However, we acknowledged that coordination would be somewhat more difficult when temporary-fixed stations are involved since RDSS licensees would not have exact information regarding the location of these stations. We therefore required temporary-fixed licensees in this band to notify RDSS licensees directly whenever the station is moved to a new location. See 47 C.F.R. §94.61(b)(4). A similar interference environment is present with MSS operations. We therefore propose to modify Section 94.61(b)(4) to extend the notification requirement for grandfathered temporary-fixed licensees to MSS licensees as well. See also Allocation Order, note 1, supra (modifying NG 147 to the Table of Frequency Allocations, 47 C.F.R. § 2.106, to recognize that "grandfathered" terrestrial stations may continue to operate on a primary basis with the MSS.)

700 operating terrestrial facilities should be moved into different bands is in the public interest. Nevertheless, we may entertain such a proposal if it is supported by a fully developed record. To this end, we urge any parties requesting a relocation to provide a concrete analysis of the interference potential, the difficulties foreseen in the coordination process, specific frequency bands to which the terrestrial operators may be relocated, the estimated costs of a move, and an assessment of other less burdensome alternatives. Affected terrestrial operators will, of course, be given an opportunity to reply.

b. Fixed services above 2500 MHz

63. The instructional television fixed service (ITFS) and the multichannel multipoint distribution service (MMDS) operate in the adjacent 2500-2690 MHz frequency band. The Committee found a serious potential for out-of-band interference into MSS downlinks at 2483.5-2500 MHz from operations in the lowest frequency portion of the ITFS/MMDS allocation.[105] The Committee stated that because both ITFS and MMDS transmissions are similar to those of television broadcast signals, they will cause harmful interference into MSS mobile user transceivers operating up to several kilometers away from the ITFS or MMDS transmitter. The Committee concluded that stricter limits on ITFS and MMDS out-of-band emissions should be imposed, and recommended that the Commission initiate such a rulemaking.[106] The Committee acknowledged, however, that making these improvements would cost up to $30,000 per ITFS or MMDS station, and that this cost might increase if these stations are converted from analog to digital technology.

64. The record is not sufficient to allow us to make a specific proposal in this area. The most serious interference problem to MSS downlinks from out-of-band terrestrial fixed services appears to stem from ITFS operations in the adjacent 2500-2506 MHz band. Our records indicate that nearly 300 ITFS stations are licensed to operate in this band. No representative from the ITFS community participated on the Committee, however. Consequently, the record has not been fully developed with respect to ITFS/MSS interference cases, sharing

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105 The Committee found that out-of-band interference from MSS into these services was not a problem. It also found that the out-of-band interference potential between MSS and other services operating in adjacent bands, including the domestic broadcast auxiliary service, the broadcasting-satellite service, and the fixed-satellite service, was insignificant and, if any problems did arise, could be easily remedied through coordination. See Committee Report at 26-27, 46-47.

106 Specifically, the Committee concluded that out-of-band emissions from the lowest frequency ITFS/MMDS channel using an analog video signal at 2500-2506 MHz should be limited to -90 dB relative to the carrier at a frequency offset from band edge between 1.25 and 2 MHz, assuming that the channel is operating at 30 dBW e.i.r.p. Adjustments could be made for higher frequency channels and for higher or lower operating e.i.r.p.s. Currently, ITFS out-of-band emissions extending more than 1 MHz below the lower band edge must be attenuated 60 dB below the peak visual carrier power. See 47 C.F.R. § 74.936(b).

possibilities, and the economic and technical tradeoffs that must be considered in developing a viable solution.

65. Accordingly, we seek comment on all aspects of the ITFS/MSS sharing issue. Specifically, commenters should address the following questions and provide concrete analyses in support of their responses: What is the extent of out-of-band interference into MSS operations from ITFS operations at 2500-2506 MHz? What is the extent of the interference potential from operations above 2506 MHz? Under what distances and powers will harmful interference occur? Can MSS operators avoid harmful interference by not providing service in those areas surrounding ITFS transmitters? Can MSS operators avoid harmful interference if they do not operate in the higher frequency portion of the 2.4 GHz band? What are the technical and economic costs to MSS operators if the MSS was required to accept interference from out-of-band ITFS emissions? Should the MSS operators be given a choice of tolerating the interference or reimbursing the ITFS operators for the cost of improving suppression? Should the ITFS bear the burden of improving out-of-band suppression pursuant to Section 74.936 of the Commission's rules, which states that "should interference occur as a result of emissions outside the assigned channel, additional attenuation may be required."[107] What level of attenuation is needed to prevent interference? If additional attenuation were required, what costs would be incurred? Is there any way these costs could be reduced? Would a conversion from analog to digital ITFS technology facilitate ITFS/MSS sharing? Is such a conversion contemplated by ITFS operators? Would costs be reduced if suppression improvements were made during the conversion? Are there any other ways to facilitate ITFS and MSS sharing? What costs are involved in these alternatives? The regulations we ultimately adopt will be based on these comments and may require ITFS operators to improve out-of-band suppression, may require MSS operators to accept additional interference, or may require a combination of both.

c. Industrial, Scientific and Medical (ISM) emissions at 2400-2500 MHz

66. The 2400-2500 MHz band may be used on a co-primary basis for Industrial, Scientific, and Medical (ISM) applications. ISM applications include microwave ovens, door openers, high frequency lighting systems, industrial equipment, and other low-powered devices. The Committee was unable to reach consensus as to whether ISM use represents a significant interference problem to MSS downlinks at 2483.5-2500 MHz. Motorola argues that ISM devices will interfere with MSS reception in densely populated areas, where ISM use is concentrated. It concludes that it may not be possible to provide MSS in these areas.[108] In contrast, LQSS, TRW, Ellipsat, and Constellation question the

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107 47 C.F.R. § 74.936.

108 See Committee Report, Addendum 3, Interference Power Due to ISM Emitters in the 2483.5-2500 MHz Band, submitted by Motorola.

applicability of the study relied upon by Motorola and argue that several mitigating effects may reduce or eliminate interference in areas with high concentrations of ISM devices.[109]

67. The record has not been sufficiently developed to allow us to make a specific proposal in this area. Further, no representative of the ISM community participated on the Committee. We therefore request additional comment regarding MSS/ISM sharing. These comments should be supported by concrete technical analyses describing the interference potential, and any proposed solutions or recommendations. Commenters should also fully detail the costs involved in any proposal.

d. Other Terrestrial Services Provided Outside the United States

68. In sixteen countries throughout the world, the 1550-1645.5 MHz band is allocated on a primary basis to the fixed service pursuant to International Radio Regulation RR 730.[110] Ground-based aeronautical radionavigation services are also operating throughout the world in the 1610-1626.5 MHz band pursuant to RR 732. Any secondary MSS downlink operations in the 1613.8-1626.5 MHz band therefore may not cause harmful interference into any of these terrestrial operations nor can the user of an MSS receiver claim protection against harmful interference from these operations unless a particular country has agreed to provide this protection. Further, RR 731F requires that MSS downlink operations in the 1.6 GHz band be coordinated and notified pursuant to Resolution 46 (WARC-92).

69. Under RR 731E, MSS transmitters in the 1610-1626.5 MHz band must also operate on a non-interference basis with respect to terrestrial stations operating in accordance with RR 730 and RR 732. These MSS stations must also be coordinated and notified under Resolution 46 (WARC-92) and may not claim interference protection from these terrestrial stations.[111] We further note that all transmitting MSS subscriber terminals will be subject to the regulatory requirements of those countries in which they are operating. User countries will be responsible for undertaking all necessary coordination with neighboring countries to protect fixed or terrestrial aeronautical radionavigation operations in those neighboring countries.

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109 See Committee Report, Addendum 2, Sharing with Services other than ARNS and RAS, submitted by Loral Qualcomm, and supported by TRW, Ellipsat, and Constellation.

110 These countries are Austria, Bulgaria, Cameroon, Germany, Guinea, Hungary, Indonesia, Libya, Mali, Mongolia, Nigeria, Poland, Romania, Senegal, Czechoslovakia, and the former U.S.S.R.

111 RR 731E also provides that an MSS earth station may not produce an e.i.r.p. density in excess of -15 dB(W/4 kHz) in that part of the band used by ground-based or satellite-borne facilities operating in accordance with RR 732. This limit has already been incorporated in our rules in proposed section 25.213(c)(1). See para. 57, supra.

C. **Feeder Links**

70. In addition to the mobile links that have been the subject of the preceding discussion, one or more "gateway" or central earth stations are needed to complete the transmission paths, process the information being transmitted, and interconnect the mobile satellite system with other communications networks or with other user transceivers. Without these "feeder links," an MSS system would be useless. Because gateway stations are at fixed locations, the feeder link operates in frequency bands allocated to the fixed-satellite service.

71. The six applicants requested a variety of feeder link frequencies and bandwidths. Constellation, Ellipsat, and LQSS each requested 66 MHz of spectrum in each transmission direction in the 5/6 GHz bands, Motorola and TRW each requested approximately 100 MHz in each direction in the 20/30 GHz Ka-band, and AMSC requested an as yet undetermined amount of spectrum in the 12/14 GHz Ku-band.[112] The Committee examined these requirements in an attempt both to identify available frequencies and to evaluate sharing possibilities with existing and future users of the band.

1. LEO/GSO Sharing

72. Since the fixed-satellite frequencies to be used for LEO MSS feeder links may also be used by GSO satellites, the Committee studied the sharing potential between LEO and GSO satellites. The Committee concluded that while interference created by antenna beam coupling between GSO earth stations and LEO satellite stations was likely,[113] coupling statistics could be reduced as much as needed through a variety of coordination procedures. According to the Committee, a comprehensive set of balanced sharing principles and interference criteria could be established if warranted. The Committee acknowledged that if this technique proves too restrictive, it may require that other options be explored, including geographic exclusion zones and dedicated frequency allocations for LEO satellite feeder link use.

73. The Committee also conducted a comprehensive analysis of the obligations of the United States under international radio regulation RR 2613, and made several specific recommendations as to how the U.S. should interpret and apply the regulation. Radio Regulation 2613 imposes various coordination obligations on LEO operators with respect to GSO fixed-satellite systems operating in the same frequency band, essentially requiring LEO operators to cease operations when beam coupling between a LEO satellite and any GSO fixed-satellite results in unacceptable interference to the GSO system. To afford a LEO operator some protection against a demand from future FSS/GSO system

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112 Committee Report, Annex 3, Report of Working Group 3, at 2.

113 Given the orbits of LEO and GSO satellites, a LEO satellite will occasionally pass below a GSO satellite and into the transmission path of an earth station to the GSO satellite. When this occurs, the transmission beams from the LEO satellite and the earth station will intersect. If the LEO and GSO systems are operating in the same frequency band, this "coupling" will produce significant interference for very short durations of time.

operators that the LEO system cease operating or reduce transmissions, the Committee suggested that the U.S. seek international agreement that RR 2613 will not be invoked to require a LEO system to terminate operations unless: (1) the affected administrations reach agreement as to a level of "accepted interference," (2) the LEO system is operating in excess of these levels, and (3) the excess interference is caused by the LEO satellite's failure to maintain sufficient angular separation between the satellites.[114]

74. We accept the Committee's analysis that sharing among LEO feeder links and GSO systems is feasible with coordination. Nevertheless, because our experience in such coordinations is limited, we will not propose specific coordination methods or procedures at this time. Rather, as the Committee recommended, we propose only to codify a general obligation to coordinate in Part 25 of the Commission's rules, while deferring the codification of any specific requirements until, and if, the need arises. We expect that domestic coordination can be accomplished through the cooperative efforts of the operators. Further, we agree with the Committee's interpretation of RR 2613 and have already begun to explore, in international forums, issues relating to international coordination of and protection for LEO system feeder links.[115]

2. Specific Feeder Link Assignments

75. Three applicants proposed to implement feeder links in various portions of the 6425-6725 MHz and 5150-5216 MHz bands. The Committee determined that the uplink frequencies at 6 GHz were available and would not cause any undue coordination problems. However, the FAA opposed use of the corresponding 5 GHz downlink frequencies. The Committee noted that the FAA is in the process of developing and implementing new navigation aids within the National Airspace System in this band. These include differential GPS, Terminal Doppler Weather Radar and Automatic Dependent Surveillance (ADS). Although a detailed interference analysis could not be performed because these navigation systems are still in their conceptual stages, a preliminary review indicated a significant interference potential from GPS and ADS applications into LEO MSS feeder link downlinks. The Committee nevertheless recommended that the Commission identify and allocate a minimum of 66 MHz of spectrum below 15 GHz for MSS/RDSS feeder links.[116] The Committee further requested that if the Commission determines that the 5150-5250 MHz band is the only suitable downlink

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[114] Committee Report at 29.

[115] We recognize, however, that it does not appear feasible to seek to implement LEO feeder links in bands that are heavily used by GSO systems. Coordinating a LEO system with every GSO satellite throughout the world would simply be too burdensome.

[116] Notwithstanding U.S. footnotes US245 and NG104 to the domestic table of frequency allocations (limiting FSS to inter-continental/international systems and subjecting FSS operations to a case-by-case electromagnetic compatibility analysis), the Committee suggested that 3600-3700 MHz and 10.95-11.20/11.45-11.70 GHz might be possible alternatives for space-to-Earth feeder link operations.

spectrum below 15 GHz, inter-agency discussions should be initiated to identify conditions that could allow sharing between MSS feeder links and the aeronautical radionavigation service. The Committee stated that if bands below 15 GHz are not found, several applicants will be faced with substantial system design and service concept modifications.

76. The Committee also evaluated the requests of two applicants for feeder links in the 18/20 GHz and 28/30 GHz bands. The Committee noted that the requested uplink frequencies at 28/30 GHz overlap frequencies being used or proposed for use by other services. Specifically, the 29.0-30.0 GHz band is being used for the Advanced Communications Technology Satellite (ACTS), NASA's FSS/MSS technology demonstration system, while the Commission proposed the 27.5-29.5 GHz band for the new local multipoint distribution service (LMDS). The Committee concluded that MSS feeder link and FSS/MSS operations such as ACTS would cause mutual interference, but that operational agreements and coordination should be able to resolve these problems.[117] It further concluded that LMDS transmissions, however, would cause unacceptable interference into MSS feeder link operations. The Committee noted that the corresponding downlink feeder link frequencies at 18/20 GHz also overlap with the fixed service and fixed-satellite service but that any potential interference problems should be resolvable through coordination.

77. In a related Notice of Proposed Rulemaking, we are proposing to conduct a Negotiated Rulemaking to assist us in assigning the 27.5-30.0 GHz frequency band.[118] We expect, in the context of that proceeding, to be able to identify sufficient spectrum within that band to satisfy the Earth-to-space feeder link requirements of all MSS Above 1 GHz applicants that may be licensed in this proceeding. Any identified uplink feeder link band segment will then be paired with corresponding downlink frequencies at 18.1-20.2 GHz. Further, we agree with the Committee that feeder links below 15 GHz, and particularly at 5 GHz, are an integral part of several applicants' system proposals and, if not available, would require significant design changes to these systems. Consequently, we will continue to pursue bands below 15 GHz for MSS Above 1 GHz feeder links. We are not prepared, however, to allow the uncertain availability of these bands to delay the licensing and implementation of MSS Above 1 GHz systems. To this end, we are placing applicants on notice that their desired bands may not be available and that they may be consequently required to modify their system design if they wish to go forward. Should the 5 GHz band or

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[117] Given the broadband service offerings on ACTS, we question whether the interference problems would, in fact, be readily resolvable.

[118] Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 MHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, FCC 93-XXX (adopted Jan. 19, 1994) (LMDS Further Notice).

another band below 15 GHz[119] become available for MSS feeder links before licenses are issued in this proceeding, applicants will be given an opportunity to amend their applications to request operational authority in these new bands.

D. Intersatellite Links

78. Motorola's proposed system includes intersatellite transmission links in the 23.18-23.38 GHz band. This proposal falls within the intersatellite service allocation at 22.55-23.55 GHz. The Committee concluded that Motorola's use of this band would be compatible with other operations in the band, which include operations by NASA, the radio astronomy service, and fixed-terrestrial services. The Committee noted, however, that NASA has indicated it would prefer that any future MSS intersatellite links operate in the 24.45-24.75 GHz band, which recently was allocated internationally and domestically for intersatellite links.[120] Nevertheless, the Committee, which included a representative of NASA, proposed that we adopt a rule indicating that the 22.55-23.00 GHz, 23.00-23.55 GHz, 24.45-24.65 GHz, and 24.65-24.75 GHz frequencies are available for use by the intersatellite service. The Committee's recommended rule regarding intersatellite service frequencies, coordination with government agencies, and sharing criteria are set forth in proposed rule section 25.279.

F. Service Rules

1. Regulatory Classification

79. Section 332 of the Communications Act, 47 U.S.C § 332, was amended by the Budget Act to require generally that providers of "commercial mobile radio services" (CMRS) offer their services on a common carrier basis. Commercial mobile radio services are defined to include all mobile radio services that are provided for profit and that make interconnected service with the public switched network available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public.[121] The Conference Report indicates that the provision of space segment capacity directly to CMRS users must be treated as common carriage.[122] However, in Section 332(c)(5), the Act provides the Commission with the discretion to continue to determine whether the provision of space segment capacity to CMRS

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119 We would welcome any specific suggestions with respect to potential MSS feeder link bands below 15 GHz. All suggestions should be accompanied by a detailed analysis of the existing use of the band, the interference potential between MSS feeder links and existing services, and the estimated cost involved in implementing the proposal, e.g., modifying equipment or relocating users.

120 See Final Acts (WARC-92), note 15, supra; Allocation Order, note 1, supra.

121 47 U.S.C. § 332(d)(1).

122 H.R. Rep. No. 103-213, 103rd Congress, First Session, 494 (1993).

providers should be treated as common carriage.[123] The Commission is considering, in the context of a separate proceeding,[124] whether it will exercise this option.

80. We tentatively conclude that the MSS Above 1 GHz service may be offered as a commercial mobile radio service. The service probably will be offered for profit and will make interconnected service available to the public. We request comment on this tentative decision. Further, assuming, without deciding, that at least some MSS Above 1 GHz service offerings fall within the definition of CMRS,[125] and that the Commission will choose to exercise its discretion under Section 332(c)(5), we request comment on whether MSS Above 1 GHz space station licensees making satellite capacity available to CMRS providers should be required to operate as common carriers.[126] In the alternative, we request comment as to how we should regulate MSS Above 1 GHz space station operators if they are not offering CMRS. When making determinations regarding common carriage obligations in the past, the Commission has examined individual service proposals in light of the criteria delineated in National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 999 (1976) (NARUC I).[127] The court in NARUC I identified two criteria as determinative of whether a service may be provided on a non-common carrier basis: (1) whether there is or should be any legal compulsion to serve the public indifferently, and (2) if not, whether there are reasons implicit in the nature of the service to expect an indifferent holding out to the eligible user public.

81. We therefore request comment regarding whether there may be any public interest reasons to impose a legal compulsion upon MSS Above 1 GHz space station operators to serve the public indifferently, even if an MSS Above 1 GHz

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123 47 U.S.C. § 332(c)(5).

124 Implementation of Title VI of the Omnibus Budget Reconciliation Act of 1993 - Regulatory Treatment of Mobile Services, 8 FCC Rcd 7988 (1993) (CMRS Rulemaking).

125 In determining whether a specific service offering constitiutes CMRS, we will evaluate the manner in which the service will be provided by the space segment licensee consistent with the approach adopted in the CMRS Rulemaking.

126 We also request comment on the appropriate regulatory provisions applicable to this service. In this regard, we note that the issue of forbearance from Title II regulation of domestic CMRS providers is now under consideration in the CMRS Rulemaking, id.

127 See, e.g., NVNG MSS Order, note 28, supra.

offering does not fall within the definition of CMRS.[128] Specifically, we would like comment on whether a decision to exempt space station operations from common carriage obligations will allow MSS Above 1 GHz licensees to engage in unreasonable or anticompetitive practices. Such an analysis should address the anticipated nature of MSS Above 1 GHz services, the likely availability of comparable services, and, if space station operators are not classified as common carriers, the possible need to impose license conditions pursuant to Titles 1 and 3 of the Act that will ensure non-discriminatory access to the space segment of these services. We recognize, however, that requiring common carriage operation may limit the amount of foreign participation in these inherently global systems, potentially impeding international coordination of these satellites. See 47 U.S.C. § 310(b). We request comment on the exent to which applicants are seeking foreign investment in their systems and whether, and the extent to which, a common carriage requirement may impact their plans. In light of NARUC I's second criterion, we seek comment regarding the likelihood that MSS Above 1 GHz space station capacity will inherently be offered as an indifferent holding out to the public.[129]

2. System License and License Term

82. MSS Above 1 GHz LEO systems involve constellations of technically identical satellites that may be launched and retired at different times. Rather than requiring each satellite to be licensed individually, we propose a "blanket" licensing approach for these systems such as the one used in the non-voice, non-geostationary (NVNG) LEO MSS.[130] Under this approach, applicants will be authorized to construct, launch and operate a system consisting of a

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128 See, e.g., NVNG MSS Order, note 28, supra (because of competitive service alternatives, applicants afforded opportunity to offer service on either a common carrier or non-common carrier basis); Second Report and Order in Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1987) (Upper L-Band MSS Order) (because only a single MSS license would be granted in the upper L-band frequencies and because MSS was a new and unprecedented service, the space segment operator was placed under an obligation to provide service on a common carrier basis).

129 The LEO applicants propose to offer services on a non-common carrier basis to enable them to tailor their offerings to meet the needs of various customers. These individualized arrangements will be based upon, among other things, demand, usage amounts, length of commitment, and payment terms. See, e.g., Application of LQSS, at 14-15. The applicants assert that this degree of regulatory flexibility is needed to enable them to respond appropriately to the market environment for MSS Above 1 GHz service.

130 See NVNG MSS Order, note 28, supra.

specified number of technically identical space stations.[131] The operating authority included in the license would begin to run on the date on which the first space station in the system begins transmissions and would be valid for a ten-year period.[132] The license would permit the licensee to replace both satellites lost during launch and older satellites retired before the end of the ten-year period with technically identical counterparts provided that the licensee certifies to the Commission, at least 30 days prior to launch, that the replacement station is technically identical to those authorized and that there is no net increase in the number of operating satellites. Requests for authority to construct additional or non-conforming LEO satellites would be treated as requests for license modification. We also propose to allow applicants and licensees to request authority to construct and launch a specified number of technically identical in-orbit spare satellites that would remain inactive until needed. Activation of these satellites would be permitted as required. Licensees would be required to certify to the Commission, within 10 days of bringing an in-orbit spare into operation, that activation of the satellite did not cause the licensee to exceed the total number of authorized operating space stations. Any additional or replacement satellites authorized within the ten-year system license term would be subsumed in the blanket license and, consequently, these authorizations would expire when the blanket license expires. These proposed rules are set forth in sections 25.143(a), (c), and (d).

83. As in the NVNG MSS, we also propose a filing window for system replacement applications.[133] Specifically, we propose that applications for next generation MSS Above 1 GHz systems be filed no earlier than three months prior to and no later than one month after the end of the seventh year of the existing system license. This will provide the Commission with ample time to act upon replacement system applications and the licensee with ample time to implement its next generation system.[134] The filing window will also provide notice of a licensee's plans. We request comment on this proposal, which is contained in proposed rule section 25.120(e).

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131 Before licenses are awarded in this service, applicants will be required to modify their pending applications for construction authority to request launch and operating authority as well. At that time, the applications may also be amended to conform to any final rules adopted in this proceeding. All applications requesting launch and operating authority must be accompanied by the appropriate filing fee.

132 This follows the single-step processing and licensing policy that has been used for satellites since 1980. See 1980 Assignment Order, 84 FCC 2d 584 (1981).

133 See NVNG MSS Order, note 28, supra; 47 C.F.R. § 25.120(e).

134 As in other satellite services, we will generally grant licensees the authority to implement replacement systems if the frequencies remain available for use by such systems. See, e.g., NVNG MSS Order, note 28, supra; 1988 Domsat Processing Order, note 27, supra, at n.31.

3. Implementation Milestones

84. Every satellite authorization issued by the Commission contains implementation milestones to ensure that licensees are building their systems in a timely manner and that the orbit-spectrum resource is not being held by licensees unable or unwilling to proceed with their plans.[135] Accordingly, we propose to adopt an implementation schedule for MSS Above 1 GHz LEO systems that is identical to the one adopted for the NVNG MSS. That is, we propose, as a general matter, that each licensee begin construction of the first two satellites of its system within one year of grant and begin construction of the remaining satellites within three years of grant. Construction of the first two satellites must be completed within four years of grant, and the entire system must be launched and operational within six years of grant. These deadlines will be included as conditions in the system license. We do not anticipate permitting any substantial deviation from this general time frame, especially with respect to commencement of construction. We will consider a slightly different completion schedule, however, if an applicant can concretely demonstrate that the size or complexity of its system warrants some additional time in which to complete construction of the system or to launch all the system's satellites. Failure to launch a sufficient number of satellites to meet our technical capacity or service requirements will render the system authorization null and void. Finally, to discourage speculators and to prevent unjust enrichment of those who do not implement systems, we propose to adopt a rule that prohibits trafficking in MSS Above 1 GHz licenses. Specifically, we propose, in section 25.143(g) of our proposed rules, to prohibit MSS Above 1 GHz licensees from selling a bare license for profit. We request comment on these proposals.

4. Reporting Requirements

85. As in the NVNG MSS, we propose to require MSS Above 1 GHz space station licensees to file annual reports describing the status of satellite construction, system utilization, and any outages or malfunctions on the system.[136] We also propose to require MSS Above 1 GHz licensees, within 10 days of each implementation milestone included in the license, to certify by affidavit to the Commission that the milestone has been met or to notify the Commission that it has not been met. As discussed, failure to meet a required milestone renders the system authorization null and void by its own terms. With respect to the construction commencement milestone, we have traditionally viewed the execution of a non-contingent construction contract as fulfilling

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135 Congress has also mandated that when competitive bidding is used, we impose performance requirements to prevent spectrum warehousing and to promote investment in and rapid deployment of new services. 47 U.S.C. § 309(j)(4)(B).

136 See 47 C.F.R. §25.210(j).

this milestone.[137] Thus, licensees' affidavits in this regard should certify that they have executed a non-contingent contract with their spacecraft manufacturer. We also believe it advisable to include in our rules language that allows us to require the submission of additional information, including copies of construction contracts, at our discretion. We request comment on these proposals, which are contained in proposed rule section 25.143(e).

5. Distress and Safety Communications

86. Although MSS Above 1 GHz applicants have not indicated that they plan to use their systems for extensive distress and safety communications, we have proposed that these systems have position determination capability,[138] and therefore have the potential to complement existing search and rescue (SAR) and disaster response services. Further, while MSS Above 1 GHz services cannot be used in lieu of distress beacons, such as emergency locator transmitters or emergency indicator radio beacons, that are required to be carried by international agreement or statute,[139] MSS Above 1 GHz system operators have certain obligations relating to maritime distress communications under Sections 321(b) and 359 of the Communications Act, 47 U.S.C. §§ 321(b), 359. Specifically, the Act requires licensees operating on U.S. territorial waters to give priority to radiocommunications or signals relating to ships in distress and to cease transmitting on frequencies that will interfere with distress signals. Further, it requires that stations on board ships must transmit to other ships in the vicinity and to authorities on land information concerning severe weather conditions or dangerous ice. The Act also prohibits licensees from charging a fee for the transmission of maritime distress calls and related traffic. Other than these mandated requirements in the Act, we do not propose to require that MSS Above 1 GHz systems provide search and rescue or disaster response communications as a general service offering. However, we expect that any satellite licensee that chooses to offer emergency or safety communications

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137 See, e.g., letters from Chief, Domestic Facilities Division to Hughes Communications Galaxy (June 7, 1990), to Alascom, Inc. (Feb. 16, 1990), to National Exchange Satellite, Inc. (Feb. 16, 1990), to Federal Express Corporation (Jan. 21, 1987), to Ford Aerospace Satellite Services Corporation (Oct. 2, 1986), to Hughes Communications Galaxy (Oct. 2, 1986), and to Satellite Transponder Leasing Corp. (Oct. 2, 1986).

138 See para. 51, supra.

139 Compulsory equipment carriage requirements are established in portions of the Commission's rules as well as by statute. See, e.g., 47 C.F.R. §§ 80.801, et seq.; Ch. IV, International Convention on the Safety of Life at Sea, 32 U.S.T. 47, T.I.A.S. 9700 (1974).

services will coordinate its effort with the appropriate search and rescue organizations.[140] These requirements are contained in proposed rule section 25.143(f).

6. Other Requirements

87. We request comment on whether any other service requirements should be imposed in the context of this proceeding. Should we, for example, require licensees to offer a specific percentage of its in-orbit system capacity to non-profit organizations for purposes such as environmental monitoring or education? Any such suggestions should be accompanied by an analysis of the utility of MSS Above 1 GHz system to provide these services and an analysis of the existing systems used to provide these services, including their costs.

G. Mobile Earth Station Licensing

88. We address here briefly the licensing procedures for the earth segment of the satellite system.[141] The ground segment will be comprised of central fixed-earth "gateway" stations operating in the feeder link frequency bands, mobile user transceiver units operating in the mobile satellite frequency bands, and tracking, telemetry, and command (TT&C) earth stations operating in either the feeder link or mobile service bands.[142] We propose to license gateway and TT&C stations as fixed-satellite earth stations under Part 25. Further, rather than requiring mobile user transceivers to be licensed individually, we propose a blanket licensing approach as is used in other mobile satellite services.[143] Under this approach, a service vendor, which may or may not be the space station licensee, would hold the authorization and responsibility for a specified number of technically identical transceiver units. Applicants requesting blanket licenses would be required to demonstrate that operation of the transceivers will not interfere with other authorized users of the spectrum. The license term for a blanket authorization would be ten years from the date of grant, and requests for authority to include

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140 For example, the Interagency Committee on Search and Rescue (ICSAR) is composed of representatives from seven Federal Agencies, including the FCC, and has search and rescue responsibilities in the United States. Any satellite operator offering emergency services within the United States should establish coordination procedures with this organization. Similar procedures should be developed with all other domestic and international search and rescue organizations so that coordinated rescue operations can be quickly effected in the geographic area of concern.

141 The June 2, 1991 filing deadline related only to space station applications to be considered in this processing round. We expect that a sizeable number of entities will apply for earth station licenses.

142 We expect that given the limited MSS spectrum, most TT&C operations will occur in the feeder link frequency bands.

143 See, e.g., NVNG MSS Order, note 28, supra; Upper L-Band MSS Order, note 127, supra; RDSS Licensing Order, note 43, supra.

additional units in the authorization would be treated as minor license modifications. Our proposals for earth station licensing and operations are set forth in sections 25.115(d)(applications for earth station authorizations), 25.130(b) (filing requirements for transmitting earth stations), 25.133(b) (period of construction; commencement of construction), 25.136 (operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service), and 25.213 (technical requirements for the 1.6/2.4 GHz mobile-satellite service). We request comment on these proposals.

89. Further, to help maintain an interference-free environment, we propose to require an end user to obtain the authorization of the space station operator, either directly or through an authorized vendor, before the user may transmit to that system. As in the NVNG MSS, we propose that once an end user has obtained authority to access a particular system, the operations of that particular user transceiver will fall under the blanket earth station license held by the space station operator or vendor. We believe that this approach will facilitate roaming by international users while still protecting the domestic electromagnetic environment.[144] The rules we propose today would not preclude bilateral, government-to-government discussions regarding international roaming arrangements with countries that license MSS Above 1 GHz systems. They also would permit roaming into the U.S. by users having technically compatible transceivers designed to operate with systems licensed in the United States. Once authorized to access a U.S.-licensed space station system, a roaming user's transceiver operations would be deemed to fall within the umbrella of the blanket earth station license held by the system operator or service vendor.

90. Finally, the regulatory treatment of earth station licensees will depend upon whether they will be providing commercial mobile radio services, although we expect that they will.[145] Earth station licensees that provide commercial mobile radio services must be regulated as common carriers.[146] We

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[144] As in the NVNG MSS, we anticipate that any subscriber transceiver being used abroad to operate with a U.S.-licensed system may be brought into the U.S. to operate with that system. Further, we urge other countries, as they license LEO satellite systems, to permit roaming into their countries by users having technically compatible transceivers.

[145] See para. 80, supra.

[146] 47 U.S.C. § 332 (c)(1). See discussion at para. 79, supra. In determining whether a specific service offering constitutes CMRS, we will evaluate the manner in which the service will be provided by the earth station licensee consistent with the approach adopted in the CMRS Rulemaking. The extent to which Title II tariff and other requirements will apply to common carrier MSS Above 1 GHz earth station licensees is being considered in a separate proceeding. See CMRS Rulemaking, note 124, supra.

are considering the general issue of what constitutes commercial mobile radio services, and the regulatory treatment to be afforded CMRS providers, in a separate proceeding. Our decisions there will be followed here.[147]

H. International Coordination

91. Non-geostationary mobile satellites will pass over all countries in their orbits around the world. Consequently, these systems will likely require global coordination. As in other satellite services, each MSS Above 1 GHz applicant and licensee will be required to provide the Commission with all information required for advance publication, coordination, and notification of frequency assignments pursuant to the international radio regulations and for consultation pursuant to Article 14 of the INTELSAT Agreement and Article 8 of the INMARSAT Convention.[148]

92. Furthermore, the International Telecommunication Union (ITU) has established a procedure governing the coordination of mobile satellite systems. That procedure assures that worldwide coordination is accomplished in a manner that requires both the administration proposing the system and the administration that is affected by the planned system to cooperate in resolving conflicts.[149] ITU Regulations do not, however, require a system to be successfully coordinated before it may be licensed.[150] We will follow the coordination procedures prescribed by the ITU and will work with the global community to promote mobile satellite services through the development of sharing techniques and the exploration of other technical issues. We also will continue to require United States licensees to meet both their international obligations and any national requirements imposed by other licensing administrations regarding operations within their territories. Consequently, all decisions relating to the implementation of 1.6/2.4 GHz mobile-satellite service within a country's territory will remain solely within that country's jurisdiction and control.

IV. CONCLUSION

93. In this Notice, we propose regulations that will allow the licensing and operation of competitive voice and data mobile-satellite service systems operating in the frequency bands above 1 GHz. This service has great potential

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147 See CMRS Rulemaking, id.

148 See 47 C.F.R. § 25.111(b).

149 ITU Resolution No. 46 (WARC - 92, Res. 46) states that "[a]ffected administrations, as well as the administration seeking coordination, shall make all possible mutual efforts to overcome the difficulties in a manner acceptable to the parties concerned."

150 Indeed, the regulations do not require that a system be successfully coordinated prior to launch, as long as the licensee operates on a non-interference basis with respect to authorized users. See International Radio Regulation (RR) 342.

to provide the United States public with a wide range of needed mobile voice services and to help stimulate the domestic economy as these multi-billion dollar systems are implemented in the United States and throughout the world. We request comment on the issues and proposals addressed in this Notice and encourage all interested parties to participate in the resolution of this matter.

V. PROCEDURAL MATTERS

A. Ex Parte Rules-Non-Restricted Proceeding

94. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed in accordance with Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

B. Regulatory Flexibility

95. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

C. Comment Dates

96. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 5, 1994, and reply comments on or before June 6, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

VI. ORDERING CLAUSE

97. Accordingly, pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), we hereby give notice of our intent to adopt the regulations and licensing policies set forth in Appendix A.

98. IT IS ORDERED that the Secretary shall send a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration in accordance with 5 U.S.C. § 601 et seq. (1981).

99. For further information regarding this Notice of Proposed Rulemaking, contact Fern Jarmulnek, Common Carrier Bureau, Domestic Facilities Division, (202) 634-1682.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47 of the Code of Federal Regulations, Parts 2, 25 and 94, are amended as follows:

1. The Table of Contents for Part 25 is revised to read as follows:

PART 25 - SATELLITE COMMUNICATIONS

Subpart A - General

Sec.

25.101 Basis and scope.

25.102 Station authorization required.

25.103 Definitions.

25.104 Preemption of local zoning of earth stations.

25.105 - 25.108 [Reserved]

25.109 Cross-reference.

Subpart B - Applications and Licenses

25.110 Filing of applications, fees, and number of copies.

25.111 Additional information.

25.112 Defective applications.

25.113 Construction permits.

25.114 Applications for space station authorizations.

25.115 Applications for earth station authorizations.

25.116 Amendments to applications.

25.117 Modification of station license.

25.118 Assignment or transfer of control of station authorization.

25.119 Application for special temporary authorization.

25.120 License term and renewals.

EARTH STATIONS

25.130 Filing requirements for transmitting earth stations.

25.132 Verification of earth station antenna performance standards.

25.133 Period of construction; certification of commencement of operation.

25.134 Licensing provisions of very small aperture terminal (VSAT) networks.

25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.

25.136 Operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service.

SPACE STATIONS

25.140 Qualifications of domestic fixed-satellite space station licensees.

25.141 Licensing provisions for the radiodetermination satellite service.

25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service.

25.143 Licensing provisions for the, 1.6/2.4 GHz mobile satellite service.

PROCESSING OF APPLICATIONS

25.150 Receipt of Applications.

25.151 Public notice period.

25.152 Dismissal and return of applications.

25.153 Repetitious applications.

25.154 Opposition to applications and other pleadings.

25.155 Mutually exclusive applications.

25.156 Consideration of applications.

FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION

25.160 Administrative sanctions.

25.161 Automatic termination of station authorization.

25.162 Cause for termination of interference protection.

25.163 Reinstatement.

Subpart C - Technical Standards

25.201 Definitions.

25.202 Frequencies, frequency tolerance and emission limitations.

25.203 Choice of sites and frequencies.

25.204 Power limits.

25.205 Minimum angle of antenna elevation.

25.206 Station identification.

25.207 Cessation of emissions.

25.208 Power flux density limits.

25.209 Antenna performance standards.

25.210 Technical requirements for space stations in the Fixed-Satellite Service.

25.211 Video transmissions in the Domestic Fixed-Satellite Service.

25.212 Narrowband transmissions in the Fixed-Satellite Service.

25.213 Inter-Service coordination requirements for the 1.6/2.4 GHz Mobile-Satellite Service.

25.251 Special requirements for coordination.

25.252 Maximum permissible interference power.

25.253 Determination of coordination distance for near great circle propagation mechanisms.

25.254 Computation of coordination distance contours for propagation modes associated with precipitation scatter.

25.255 Guidelines for performing interference analyses for near great circle propagation mechanisms.

25.256 Guidelines for performing interference analyses for precipitation scatter modes. [Reserved]

Subpart D -- Technical Operations

25.271 Control of transmitting stations.

25.272 General inter-system coordination procedures.

25.273 Duties regarding space communications transmissions.

25.274 Procedures to be followed in the event of interference.

25.275 Particulars of operation.

25.276 Points of communication.

25.277 Temporary fixed earth station operations.

25.278 Additional coordination obligation for non-geostationary and geostationary satellite systems in frequencies allocated to the Fixed-Satellite Service.

Subpart E - Developmental Operations

25.279 Inter-Satellite Service.

25.300 Developmental operation.

25.308 Automatic Transmitter Identification System (ATIS)

Subparts F - G -- [Reserved]

Subpart H - Authorization To Own Stock in the Communications Satellite Corporation

25.501 Scope of this subpart.

25.502 Definitions.

25.503 - 25.504 [Reserved]

25.505 Persons requiring authorization.

25.506 - 25.514 [Reserved]

25.515 Method of securing authorization.

25.516 - 25.519 [Reserved]

25.520 Contents of application

25.521 Who may sign applications.

25.522 Full disclosures.

25.523 Form of application, number of copies, fees, etc.

25.524 [Reserved]

25.525 Action upon applications.

25.526 Amendments.

25.527 Defective applications.

25.528 - 25.529 [Reserved]

25.530 Scope of authorization.

25.531 Revocation of authorization.

2. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Sections 101 - 404, 76 Stat. 419 - 427; 47 U.S.C. 701 - 744, Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interprets or applies sec. 303, 48 Stat. 1082, as amended; 47 U.S.C. 303.

3. Section 25.114 is amended by revising paragraphs (c)(6), (c)(18), and (c)(26), and adding new paragraphs (c)(28) and (d), to read as follows:

§ 25.114 Applications for space station authorizations.

* * * * *

(c) * * *

(6) (i) For geostationary satellite orbit satellites, orbital location, or locations if alternatives are proposed, requested for the satellite, the factors which support such an orbital assignment, the range of orbital locations from which adequate service can be provided and the basis for determining that range of orbital locations, and a detailed explanation of all factors that would limit the orbital arc over which the satellite could adequately serve its expected users.

(ii) For non-geostationary satellite orbit satellites, the number of space stations and applicable information relating to the number of orbital planes, the inclination of the orbital plane(s), the orbital period, the apogee, the perigee, the argument(s) of perigee, active service arc(s), and right ascension of the ascending node(s).

* * * * *

(18) Detailed information demonstrating the financial qualifications of the applicant to construct and launch the proposed satellites. Applications for domestic fixed-satellite systems and mobile-satellite systems shall provide the financial information required by § 25.140(b)-(e), § 25.142(a)(4), or § 25.143(b)(3), as appropriate. Applications for international satellite systems authorized pursuant to Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985), recon. 61 RR 2d 649 (1986), further recon. 1 FCC Rcd 439 (1986), shall provide the information required by that decision.

* * * * *

(26) Applications for authorizations in the mobile-satellite Service in the 1545-1559/1646.5-1660.5 MHz frequency bands shall also provide all information necessary to comply with the policies and procedures set forth in Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service, 52 FR 4017 (Feb. 9, 1987), 2 FCC Rcd 485 (1987).

* * * * *

(28) Applications for authorizations in the 1.6/2.4 GHz Mobile-Satellite Service shall also provide all information specified in § 25.143.

(d) Applicants requesting authority to construct and/or launch a system comprised of technically identical, non-geostationary satellite orbit mobile-satellite service space stations may file a single "blanket" application containing the information specified in paragraph (c) of this section for each representative space station.

4. Section 25.115 is amended by revising paragraph (d) to read as follows:

§ 25.115 Applications for earth station authorizations.

* * * * *

(d) User transceivers in the NVNG and 1.6/2.4 GHz Mobile-Satellite Service need not be individually licensed. Service vendors may file blanket applications for transceiver units using FCC Form 493 and specifying the number of units to be covered by the blanket license. Each application for a blanket license under this section shall include the following:

(1) A general narrative section describing the applicant and the overall system operation,

(2) A Form 430 (Licensee Qualification Report), if not already on file in conjunction with other facilities licensed under this subpart,

(3) A Form 493 for each fixed-gateway, TT&C or Network Control Center station operating with the network,

(4) A Form 493 for each representative type of user transceiver terminal unit,

(5) A designation of a point of contact where records of individual users will be maintained.

In addition, applicants in the NVNG MSS service shall provide the information described in § 25.135. Applicants in the 1.6/2.4 GHz Mobile-Satellite Service shall demonstrate that the stations comply with the technical requirements specified in § 25.213.

5. Section 25.120 is amended by revising paragraphs (d) and (e) to read as follows:

§ 25.120 License term and renewals.

* * * * *

(d) Space stations.

(1) For geostationary satellite orbit satellites, the license term will begin at 3 a.m. EST on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and that the operations of the satellite fully conform to the terms and conditions of the space station radio authorization.

(2) For non-geostationary satellite orbit satellites, the license term will begin at 3 a.m. EST on the date that the licensee certifies to the Commission that its initial space station has been successfully placed into orbit and that the operations of that satellite fully conform to the terms and conditions of the space station system authorization. All space stations launched and brought into service during the ten-year license term shall operate pursuant to the system authorization, and the operating authority for all space stations will terminate upon the expiration of the system license.

(e) **Renewal of licenses.** Applications for renewals of earth station license must be submitted on FCC Form 405 (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days, and no later than 30 days, before the expiration date of the license. Applications for space station system replacement authorization for non-geostationary orbit satellites shall be filed no earlier than 90 days, and no later than 30 days, prior to the end of the seventh year of the existing license term.

6. Section 25.130 is amended by revising paragraph (b) to read as follows:

§ 25.130 Filing requirements for transmitting earth stations.

* * * * *

(b) A frequency coordination analysis in accordance with §25.203 shall be provided for earth stations transmitting in the frequency bands shared with equal rights between terrestrial and space services, except that applications for user transceiver units associated with the NVNG mobile-satellite service shall instead provide the information required by § 25.135 and applications for user transceiver units associated with the 1.6/2.4 GHz Mobile-Satellite Service shall demonstrate that user transceiver operations comply with the requirements set forth in § 25.213.

7. Section 25.133 is amended by revising paragraph (b) to read as follows:

§ 25.133 Period of construction; certification of commencement of operation.

* * * * *

(b) Each license for a transmitting earth station included in this part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification containing the following information: The name of the licensee; file number of the application; call sign of the antenna; date of the license; a certification that the facility as authorized has been completed and that each antenna facility has been tested and is within 2 dB of the pattern specified in § 25.209; the date on which the station became operational; and a statement that the station will remain operational during the license period unless the license is submitted for cancellation. For stations authorized under § 25.115(c) of this part (Large Networks of Small Antennas operating in the 12/14 GHz bands) and § 25.115(d) of this part (User Transceivers in the Mobile-Satellite Service), a certificate must be filed when the network is put into operation.

8. A new section 25.136 is added to read as follows:

§ 25.136 Operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service

In addition to the technical requirements specified in § 25.213, earth stations operating in the 1.6/2.4 GHz Mobile-Satellite Service are subject to the following operating conditions:

(a) User transceiver units associated with the 1.6/2.4 GHz mobile-satellite service may not be operated on civil aircraft unless the earth station has a direct physical connection to the aircraft Cabin Communication system.

(b) User transceiver units in this service are authorized to communicate with and through U.S. authorized space stations only. No person shall transmit to a space station unless the specific transmission is first authorized by the space station licensee or by a service vendor authorized by that licensee.

(c) Any user transceiver unit associated with this service will be deemed, when communicating with a particular 1.6/2.4 GHz Mobile-Satellite service system pursuant to paragraph (b) of this section, to be temporarily associated with and licensed to the system operator or service vendor holding the blanket earth station license awarded pursuant to Section 25.115(d). The domestic earth station licensee shall, for this temporary period, assume the same licensee responsibility for the user transceiver as if the user transceiver were regularly licensed to it.

9. Section 25.141 is amended by revising paragraphs (a) and (f) to read as follows:

§ 25.141 Licensing provisions for the radiodetermination satellite service.

(a) Space station application requirements. Each application for a space station license in the radiodetermination satellite service shall describe in detail the proposed radiodetmination satellite system, setting forth all pertinent technical and operational aspects of the system, including its capability for providing and controlling radiodetermination service on a geographic basis, and the technical, legal and financial qualifications of the applicant. In particular, each application shall include the information specified in appendix B of Space Station Application Filing Procedures, 93 FCC 2d 1260, 1265 (1983), except that in lieu of demonstrating compliance with item II.F (two degree spacing), applicants are required to demonstrate compatibility with licensed satellite systems in the same frequency band. Applicants must also file information demonstrating compliance with all requirements of this section, specifically including information demonstrating how the applicant has complied or plans to comply with the requirements of paragraph (f) of this section.

* * * * *

(f) Radiodetermination satellite service. Licenses shall coordinate with radiodetermination satellite system licensees to avoid harmful interference to other radiodetermination satellite systems through (1) power flux density limits; (2) use of pseudorandom-noise codes (for both the satellite-to-user link and for the user-to-satellite link); and (3) random access, time division multiplex techniques. Licenses shall coordinate with 1.6/2.4 GHz Mobile-Satellite Service system licensees to avoid harmful interference to 1.6/2.4 GHz Mobile-Satellite Service systems.

10. A new Section 25.143 is added to read as follows:

§ 25.143 Licensing provisions for the 1.6/2.4 GHz Mobile-Satellite Service.

(a) System License: Applicants authorized to construct and launch a system of technically identical non-geostationary satellite orbit satellites will be awarded a single "blanket" license covering a specified number of space stations.

(b) Qualification Requirements.

(1) General Requirements: Each application for a space station system authorization in the 1.6/2.4 GHz mobile-satellite service shall describe in detail the proposed satellite system, setting forth all pertinent technical and operational aspects of the system, and the technical, legal, and financial qualifications of the applicant. In particular, each application shall include the information specified in § 25.114.

(2) Technical Qualifications: In addition to providing the information specified in (b)(1), each applicant shall demonstrate the following:

(i) that the proposed system employs a non-geostationary constellation or constellations of satellites;

(ii) that the proposed system is capable of providing mobile satellite services to all areas of the world, with the exception of the polar regions, at least 75% of every 24-hour period, i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° for at least 18 hours each day;

(iii) that the proposed system is capable of providing voice service on a continuous basis throughout the U.S., i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° at any point within the United States at all times;

(iv) that operations will not cause unacceptable interference to other authorized users of the spectrum. In particular, each application shall demonstrate that the space station(s) comply with the requirements specified in § 25.213.

(3) Financial Qualifications: Each applicant for a space station system authorization in the 1.6/2.4 GHz mobile-satellite service must demonstrate, on the basis of the documentation contained in its application, that it is financially qualified to meet the estimated costs of the construction and launch of all proposed space stations in the system and the estimated operating expenses for one year after the launch of the initial space station. Financial qualifications must be demonstrated in the form specified in §§ 25.140(c) and (d) Failure to make such a showing will result in the dismissal of the application.

(c) Replacement of Space Stations Within the System License Term. Licensees of non-geostationary 1.6/2.4 GHz mobile-satellite systems authorized through a blanket license pursuant to paragraph (a) of this section need not file separate applications to construct, launch and operate technically identical replacement satellites within the term of the system authorization. However, the licensee shall certify to the Commission, at least thirty days prior to launch of such replacement(s) that:

(1) the licensee intends to launch a space station that is technically identical to those authorized in its system authorization, and

(2) launch of this space station will not cause the licensee to exceed the total number of operating space stations authorized by the Commission.

(d) In-Orbit Spares. Licensees need not file separate applications to operate technically identical in-orbit spares authorized as part of the blanket license pursuant to paragraph (a) of this section. However, the licensee shall certify to the Commission, within 10 days of bringing the in-orbit spare into operation, that operation of this space station did not cause the licensee to exceed the total number of operating space stations authorized by the Commission.

(e) Reporting requirements.

(1) All operators of 1.6/2.4 GHz mobile-satellite systems shall, on June 30 of each year, file with the Common Carrier Bureau and the Field Office in Laurel, Maryland a report containing the following information:

(i) Status of satellite construction and anticipated launch dates, including any major problems or delays encountered;

(ii) A listing of any non-scheduled space station outages for more than 30 minutes and the cause or causes of the outage;

(iii) A detailed description of the utilization made of the in-orbit satellite system. That description should identify the percentage of time that the system is actually used for U.S. domestic or transborder transmission, the amount of capacity (if any) sold but not in service within U.S. geographic areas, and the amount of unused system capacity; and

(iv) Identification of any space stations not available for service or otherwise not performing to specifications, the cause or causes of these difficulties, and the date any space station was taken out of service or the malfunction identified.

(2) All operators of 1.6/2.4 GHz mobile-satellite systems shall, within 10 days after a required implementation milestone as specified in the system authorization, certify to the Commission by affidavit that the milestone has been met or notify the Commssion by letter that it has not been met. At its discretion, the Commission may require the submission of additional information (supported by affidavit of a person or persons with knowledge thereof) to demonstrate that the milestone has been met.

(f) Safety and distress communications. Stations operating in the 1.6/2.4 GHz Mobile-Satellite Service that are used to comply with any statutory or regulatory equipment carriage requirements may also be subject to the provisions of Sections 321(b) and 359 of the Communications Act of 1934, as amended. Licensees are advised that these provisions give priority to radio communications or signals relating to ships in distress and prohibits a charge for the transmission of maritime distress calls and related traffic.

(g) Considerations involving transfer or assignment applications.

(1) "Trafficking" in licenses issued pursuant to paragraph (a) of this section is prohibited.

(2) The Commission will review a proposed transaction to determine if the circumstances indicate trafficking in licenses whenever applications (except those involving *pro forma* assignment or transfer of control) for consent to assignment or a license, or for transfer of control of a licensee, involve facilities licensed pursuant to paragraph (a) of this section. At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that no trafficking has occurred.

(3) If a proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests, any showing requested under paragraph (g)(2) of this section shall include an additional exhibit which:

(i) Discloses complete details as to the sale of facilities or merger of interests;

(ii) Segregates clearly by an itemized accounting, the amount of consideration involved in the sale of facilities or merger of interests; and

(iii) Demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction.

11. Section 25.201 is amended by adding new paragraphs, in alphabetical order, to read as follows:

§ 25.201 Definitions.

* * * * *

Mobile-Satellite Service. A radiocommunication service: (1) Between mobile earth stations and one or more space stations, or between space stations used by this service; or (2) Between mobile earth stations by means of one or more space stations. This service may also include feeder links necessary for its operation. (RR)

* * * * *

1.6/2.4 GHz Mobile-Satellite Service: A mobile-satellite service that operates in the 1610-1626.5 MHz and 2483.5-2500 MHz frequency bands, or in any portion thereof.

* * * * *

12. Section 25.202 is amended by adding new paragraphs (a)(4) and (a)(5) to read as follows:

§ 25.202. Frequencies, frequency tolerance and emission limitations.

* * * * *

(a) * * *

(4) The following frequencies are available for use by the 1.6/2.4 GHz Mobile-Satellite Service:

1610-1626.5 MHz:	User-to-Satellite Link
1613.8-1626.5 MHz:	Satellite-to-User Link (secondary)
2483.5-2500 MHz:	Satellite-to-User Link

(5) The following frequencies are available for use by the inter-satellite service:

22.55-23.00 GHz
23.00-23.55 GHz
24.45-24.65 GHz
24.65-24.75 GHz

13. Section 25.203 is amended by revising paragraph (c)(2)(vii) and adding new subsections (j) and (k) to read as follows:

§ 25.203 Choice of sites and frequencies.

* * * * *

(c) * * *

(2)(vii) Antenna horizon gain plot(s) determined in accordance with § 25.253(b) for satellite longitude range specified in paragraph (c)(2)(v) of this section, taking into account the provisions of § 25.253(a)(2) for earth stations operating with non-geostationary satellites.

* * * * *

(j) Applicants for non-geostationary 1.6/2.4 GHz Mobile-Satellite Service / radiodetermination satellite service feeder links outside the bands specified in § 25.202(a)(5) shall indicate the frequencies and spacecraft antenna gain contours towards each feeder-link earth station location and will coordinate with licensees of other fixed-satellite service and terrestrial-service systems sharing the band to determine geographic protection areas around each non-geostationary mobile-satellite service / radiodetermination satellite service feeder link earth station.

(k) An applicant for a non-geostationary space station or earth station that will operate with a geostationary satellite or non-geostationary satellite in a shared frequency band in which the non-geostationary system is (or is proposed to be) licensed for feeder links, shall demonstrate in its application that its proposed space or earth station will not cause unacceptable interference to any other satellite network that is authorized to operate in the same frequency band, or certify that the operations of its space or earth station shall conform to established coordination agreements between the operator(s) of the space station(s) with which the earth station is to communicate and the operator(s) of any other space station licensed to use the band.

14. Section 25.208 is amended by revising paragraph (c) to read as follows:

§ 25.208 Power flux density limits.

(c) In the 17.7-19.7 GHz, 22.55-23.00 GHz, 23.00-23.55 GHz, and 24.45-24.75 GHz frequency bands, the power flux density at the Earth's surface produced by emissions from a space station for all conditions and for all methods of modulation shall not exceed the following values:

-115 dB(W/m^2) in any 1 MHz band for angles of arrival between 0 and 5 degrees above the horizontal plane.

-115 + 0.5 (d-5) dB (W/m^2) in any 1 MHz band for angles of arrival d (in degrees) between 5 and 25 degrees above the horizontal plane.

-105 dB (W/m^2) in any 1 MHz band for angles of arrival between 25 and 90 degrees above the horizontal plane.

15. A new Section 25.213 is added to read as follows:

§ 25.213 Inter-Service coordination requirements for the 1.6/2.4 GHz Mobile-Satellite service

(a) Protection of the radio astronomy service against interference from mobile-satellite service systems in the 1610.6-1613.8 MHz band.

(1) Protection zones. All 1.6/2.4 GHz Mobile-Satellite Service systems shall be capable of determining the position of the user transceivers accessing the space segment through either internal radiodetermination calculations or external sources such as LORAN-C or the Global Positioning System. During periods of radio astronomy observations, land mobile earth stations shall not operate in the 1610.6-1613.8 MHz frequency band when located within the geographic protection zones defined by the radio observatory coordinates and separation distances as follows:

(i) Within a 160 km radius of the following radio astronomy sites:

Observatory	Latitude (DMS)	Longitude (DMS)
Arecibo, PR	18 20 46	66 45 11
Green Bank Telescope, WV	38 25 59	79 50 24
	38 26 08	79 49 42
Very Large Array, NM	34 04 43	107 37 04
Owens Valley, CA	37 13 54	118 17 36
Ohio State, OH	40 15 06	83 02 54

(ii) Within a 50 km radius of the following sites:

Observatory	Latitude (DMS)	Longitude (DMS)
Pile Town, NM	34 18 04	108 07 07
Los Alamos, NM	35 46 30	106 14 42
Kitt Peak, AZ	31 57 22	111 36 42
Ft. Davis, TX	30 38 06	103 56 39
N. Liberty, IA	41 46 17	91 34 26
Brewster, WA	48 07 53	119 40 55
Owens Valley, CA	37 13 54	118 16 34
St. Croix, VI	17 45 31	64 35 03
Mauna Kea, HI	19 48 16	155 27 29
Hancock, NH	42 56 01	71 59 12

(iii) For airborne earth stations operating in the 1610.6-1613.8 MHz frequency band, the separation distance shall be the larger of the distance specified in subparagraph (1) or (2) of this paragraph, as appropriate, or the distance, d, as given by the formula:

d (km) = 4.1 square root of (h)

where h is the altitude of the aircraft in meters above ground level.

(iv) A smaller geographic protection zone may be used in lieu of the areas specified in subparagraphs (i), (ii), and (iii) of this paragraph if agreed by the mobile-satellite service licensee and the Electromagnetic Spectrum Management Unit (ESMU), National Science Foundation, Washington, D.C. upon a showing by the mobile-satellite service licensee that the operation of a mobile earth station will not cause harmful interference to a radio astronomy observatory during periods of observation.

(v) The ESMU shall notify mobile-satellite service space station licensees authorized to operate in the 1610.6-1613.8 MHz band of periods of radio astronomy observations. The mobile-satellite system shall be capable of terminating operations in this band within the first position fix of the mobile terminal prior to transmission or as soon as practicable after entering the protection zone.

(vi) A beacon-actuated protection zone may be used in lieu of fixed protection zones in the 1610.6-1613.8 MHz band if a coordination agreement is reached between a mobile-satellite system licensee and the EMSU on the specifics of beacon operations.

(vii) Additional radio astronomy sites, not located within 100 miles of the 100 most populous urbanized areas as defined by the United States Census Bureau at the time, may be afforded similar protection one year after notice to the mobile-satellite system licensee and the issuance of a public notice by the Commission.

(2) Mobile-satellite service space stations transmitting in the 1613.8-1626.5 MHz band shall limit out-of-band emissions so as not to exceed -238 dB(W/m^2/Hz) during observations at the facilities listed in paragraph (a)(1)(i) of this section and -198 dB(W/m^2/Hz) during the observations at the facilities listed in paragraph (a)(1)(ii) of this section.

(3) Mobile-satellite service space stations operating in the 2483.5-2500 MHz frequency band shall limit spurious emission levels in the 4990-5000 MHz band so as not to exceed -241 dB(W/m^2/Hz) at the surface of the Earth.

(b) Protection of the radionavigation-satellite service operating in the 1559-1610 MHz band. Mobile earth stations operating in the 1610-1626.5 MHz band shall limit out-of-band emissions in the 1574.397-1576.443 MHz band so as not to exceed an e.i.r.p. density level of -70 dB(W/MHz) average over any 20 ms period. The e.i.r.p. of any discrete spurious emission (i.e., bandwidth less than 600 Hz) in the 1574.397-1576.443 MHz band shall not exceed -80 dBW.

(c) Protection of aeronautical radionavigation systems operating pursuant to International Radio Regulation RR 732.

(1) Mobile-satellite earth stations transmitting in the 1610-1626.5 MHz band shall limit e.i.r.p. levels to no greater than -15 dB (W/4kHz) on frequencies being used by systems operating in accordance with International Radio Regulation RR 732, and to no greater than -3 dB (W/4kHz) on frequencies that are not so being used. Pursuant to RR 731E and RR 731F, all mobile-satellite operations in the 1610-1626.5 MHz band (both Earth-to-space and space-to-Earth) must be coordinated with systems operating pursuant to RR 732. Such mobile-satellite stations shall not cause harmful interference to, or claim protection from, stations in the aeronautical radionavigation service and stations operating pursuant to RR 732.

(2) Airborne 1.6/2.4 Mobile-Satellite Service earth stations shall not operate on civil aircraft unless the earth station has a direct physical connection to the aircraft cabin communication system.

(3) Mobile-satellite space stations transmitting in the 1613.8-1626.5 MHz space-to-Earth band shall not exceed a power flux density level of -141.5 dBW/m^2 - 4 KHz in the 1613.8-1616 MHz band.

(d) Protection from fixed stations operating pursuant to International Radio Regulation RR 730. Pursuant to RR 731E, all mobile-satellite operations in the 1610-1626.5 MHz band (both Earth-to-space and space-to-Earth) must be coordinated with systems operating pursuant to RR 730. All such mobile-satellite stations shall not cause harmful interference to, or claim protection from, stations in the fixed service operating pursuant to RR 730.

16. A new Section 25.278 is added to read as follows:

§ 25.278 Additional coordination obligation for non-geostationary and geostationary satellite systems in frequencies allocated to the Fixed-Satellite Service.

Licensees of non-geostationary satellite systems that use frequency bands allocated to the fixed-satellite service for their feeder link operations shall coordinate their operations with licensees of geostationary fixed-satellite service systems licensed by the Commission for operation in the same frequency bands. Licensees of geostationary fixed-satellite service systems in the frequency bands that are licensed to non-geostationary satellite systems for feeder link operations shall coordinate their operations with the licensees of such non-geostationary satellite systems.

17. A new section 25.279 is added to read as follows:

§ 25.279 Inter-satellite service.

(1) Any non-geostationary satellite communicating with other space stations may use frequencies in the inter-satellite service as indicated in § 2.106. This does not preclude the use of other frequencies for such purposes as provided for in several service definitions, e.g., FSS. The technical details of the proposed inter-satellite link shall be provided in accordance with § 25.114(c).

(2) Operating conditions. In order to ensure compatible operations with authorized users in the frequency bands to be utilized for operations in the inter-satellite service, these inter-satellite service systems must operate in accordance with the conditions specified in this section.

(a) Coordination requirements with federal government users.

(i) In frequency bands allocated for use by the inter-satellite service that are also authorized for use by agencies of the federal government, the federal use of frequencies in the inter-satellite service frequency bands is under the regulatory jurisdiction of the National Telecommunications and Information Administration (NTIA).

(ii) The Commission will use its existing procedures to reach agreement with NTIA to achieve compatible operations between federal government users under the jurisdiction of NTIA and inter-satellite service systems through frequency assignment and coordination practice established by NTIA and the

Interdepartment Radio Advisory Committee (IRAC). In order to facilitate such frequency assignment and coordination, applicants shall provide the Commission with sufficient information to evaluate electromagnetic compatibility with the federal government users of the spectrum, and any additional information requested by the Commission. As part of the coordination process, applicants shall show that they will not cause interference to authorized federal government users, based upon existing system information provided by the government. The frequency assignment and coordination of the satellite system shall be completed prior to grant of construction authorization.

(b) Coordination among inter-satellite service systems. Applicants for authority to establish inter-satellite service are encouraged to coordinate their proposed frequency usage with existing permittees and licensees in the inter-satellite service whose facilities could be affected by the new proposal in terms of frequency interference or restricted system capacity. All affected applicants, permittees, and licensees, shall at the direction of the Commission, cooperate fully and make every reasonable effort to resolve technical problems and conflicts that may inhibit effective and efficient use of the radio spectrum; however, the permittee or licensee being coordinated with is not obligated to suggest changes or re-engineer an applicant's proposal in cases involving conflicts.

18. The authority citation for Part 94 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

19. Section 94.61 is amended by revising paragraph (b)(4) to read as follows:

§ 94.61 Applicability.

* * * * *

(b)(4) Frequencies in this band are shared with mobile and radiolocation stations in other services, and must accept harmful interference that may be experienced from operations of industrial, scientific, or medical (ISM) equipment operating on 2450 MHz. In the 2483.5-2500 MHz band, no applications for new stations or modifications to existing stations to increase the number of transmitters will be accepted. Existing licensees as of July 25, 1985, are grandfathered and their operation is co-primary with the Radiodetermination Satellite Service and Mobile-Satellite Service. However, all grandfathered temporary fixed licensees are required to notify directly each Radiodetermination Satellite Service and Mobile-Satellite Service licensees concerning present and proposed locations of operations.

APPENDIX B

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rulemaking is initiated to obtain comment on the proposed licensing and regulation of a new mobile-satellite service.

Objectives

The Commission seeks to evaluate the whether the proposed licensing and regulatory proposals will result in the most reasonable and effective regulation of the voice mobile-satellite service operating in the frequency bands above 1 GHz.

Legal Basis

The proposed action is authorized under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 303(r).

Reporting, Recordkeeping and Other Compliance Requirements

Licensees in the voice mobile-satellite service will be required to notify the Commission regarding the construction, launch and operation of their satellite systems.

Federal Rules That Overlap, Duplicate or Conflict With These Requirements

None.

Description, Potential Impact and Number of Small Entities Involved

Any policies or regulations adopted in this proceeding could affect the marketing opportunities of potential new service providers or equipment manufacturers, who may be small entities, in the voice mobile-satellite service. As this is a new service, the number of such small business is unknown.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With the Stated Objectives

This Notice solicits comments on any suggested alternatives.

January 19, 1994

Separate Statement

of

Commissioner Andrew C. Barrett

Re: LEO Satellite Services at 1.6 GHz

This Notice of Proposed Rulemaking raises the appropriate issues and will allow the Commission to move forward in this area expeditiously. I support the proposed sharing plan which addresses applications filed by CDMA and FDMA/TDMA LEO mobile satellite proponents. Hopefully, commenters in this docket will find merit in this proposal. In the alternative, if the proposed sharing plan is not adopted, I will support moving forward expeditiously in order to license this service by lottery or auction under the proposed allocation schemes. I also look forward to comments in this docket regarding the implications on foreign investment if these LEO mobile services are classified as common carriers. Finally, we must ensure that our proposed rules do not provide room for speculative applicants to encumber this spectrum or receive unjust enrichment by selling undeveloped spectrum. Thus, I support strict financial qualification and construction requirements in this docket.

Before the FCC 93-428
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of	)	
Sections of the Cable Television	)	MM Docket No. 92-266
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Rate Regulation	)	

First Order on Reconsideration,
Second Report and Order,
and
Third Notice of Proposed Rulemaking

Adopted: August 27, 1993 Released: August 27, 1993

Comments Due: September 30, 1993
Reply Comments Due: October 7, 1993

By the Commission: Chairman Quello issuing a separate statement; Commissioner Barrett issuing a separate statement.

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APPENDIX A: RULES

APPENDIX B: PARTIES

I. INTRODUCTION

1. In the Rate Order and Further Notice of Proposed Rule Making in MM Docket No. 92-266 ("Rate Order" and "Further

1.Notice")[1] this Commission adopted rules and established policies to implement cable rate regulation pursuant to the dictates of the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act," "Cable Act of 1992" or "Act").[2] The primary results of the Rate Order were: 1) development of a process for identifying those situations where effective competition exists (and rate regulation is thus precluded); 2) establishment of the boundaries between local and state, and federal responsibilities; and 3) development of procedural and substantive rules to govern the regulation of basic service tier rates, cable programming service tier rates, equipment rates, and rates for leased access channels. The Further Notice addressed whether the Commission should refines its initial rate-setting analysis by excluding from its sample of systems facing effective competition the rates of one statutorily identified group of systems, *i.e.*, cable systems with less than 30 percent penetration.

2. The issues raised in petitions for reconsideration of the Rate Order are as numerous and as varied as the regulations and policies adopted therein.[3] With the first stages of cable rate regulation imminent, the Commission undertakes today to dispose of as many of the most pressing issues as possible, with the remaining issues to be resolved in the near future. Accordingly, this First Order on Reconsideration, Second Rate Order and Third Notice of Proposed Rulemaking, ("Rate Reconsideration") is the first of two Orders that will dispose of issues raised in petitions for reconsideration of the Rate Order.[4] It also resolves the further rulemaking issue raised in the Further Notice.

3. We find good cause under the Administrative Procedure Act to make this Order effective upon publication in the Federal

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[1] FCC 93-177, released May 3, 1993; 58 Fed. Reg. 29736 (published May 21, 1993).

[2] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The 1992 Cable Act became law on October 5, 1992. This proceeding specifically implements sections 3 (subscriber rate regulation), 9 (commercial leased access), and 14 (subscriber bill itemization) of the Act, and was commenced through the issuance of a Notice of Proposed Rule Making in MM Docket No. 92-266 ("Notice"), 8 FCC Rcd 510 (1992).

[3] For a list of parties in this proceeding, see Appendix B.

[4] Amendments to the rules are located at Appendix A.

Register.[5] As explained below, the clarifications to our rules adopted in this Order refine our benchmark system of rate regulation. It is important these changes go into effect as soon as practical, in order to facilitate compliance of cable operators with the 1992 Cable Act and the Commission's implementing regulations, which go into effect September 1, 1993. Accordingly, we will make this Order and the implementing rule changes effective upon publication in the Federal Register. We also revise our rules to make them reflect the September 1, 1993, effective date adopted in an Order on July 27, 1993.[6]

II. SUMMARY

4. Specifically, this Rate Reconsideration effects the following actions:

1) With the regard to the benchmark methodology adopted in the Rate Order for setting rates, it:[7]

* affirms the Commission's determination to set initial rates for all regulated tiers of service at a level that approximates as closely as possible that which would occur in a competitive marketplace;

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[5] The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance publication in the Federal Register for good cause. See 5 U.S.C. Section 553(d)(1); see also 47 C.F.R. Section 1.427(b).

[6] Order, MM Docket 92-266, FCC 93-372 (released July 27, 1993), 58 FR 41042 (Aug. 2, 1993).

[7] The benchmark formula itself is still under review. In view of the importance of the formula to the rate regulation scheme, it will be revisited in the next reconsideration Order as soon as possible, and will be accompanied by any appropriate transition mechanisms. (One of the potentially significant issues under review, for instance, is whether the number of regulated satellite channels on a given system is an appropriate variable in setting the system's rates.) We note here that small systems, which may face disproportionate administrative burdens and costs of compliance with rate regulation, have been exempted from the rate rules until reconsideration of the benchmark formula and roll-back provisions is complete. See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, FCC-389 (released Aug. 10, 1993), 58 FR 43816 (Aug. 18, 1993). Such reconsideration will include an examination of what formula adjustments or rules might be appropriate for small cable systems.

* affirms the Commission's decision to use the universe of cable systems facing effective competition, strictly as defined in the statute, as a guide for establishing the competitive rate level; and

* affirms the use of a benchmark formula based on the rates of competitive systems, in conjunction with a rate rollback based on the "competitive differential" between rates charged by competing systems and noncompeting systems, for determining each cable system's legally permissible initial rate;

2) With regard to price caps and the mechanisms for determining permissible rate increases, this Order:

* affirms that rates for regulated service set by the benchmark will be governed by a price cap mechanism once initial regulated rates are determined;

* affirms the accordance of external cost treatment to retransmission consent fees incurred after October 6, 1994, other programming cost increases, franchise fees, taxes and the costs of franchise requirements including PEG channels;

* affirms, in general and at this time, that costs associated with upgrades and other capital improvements be evaluated using cost-of-service principles and not be passed through as external costs;

* determines that only costs of meeting franchise requirements specifically enumerated in the franchise agreement will be eligible for external cost treatment;

* establishes a test for external treatment of taxes;

* lifts the limitation on programming cost increases for affiliated program services in favor of rules designed to prevent abuse of the pass-through allowance while not restricting recovery for programing cost increases that occur generally in the marketplace; and

* affirms the starting date for external costs treatment.

3) With regard to rate-setting procedures, this Order:

* rejects arguments that refunds for overcharges on the basic service tier are not permissible under the Act;

* rejects the contention that franchise authorities can specify the content of the basic tier (beyond inclusion of PEG channels) under the statute;

* allows cable operators to file rate increases quarterly while requiring that filings reflecting increases in external costs also reflect any decreases in such costs; and

* requires cable operators to file revised rates reflecting decreases in external costs no later than one year from the date on which the decrease occurs.[8]

4) This Order addresses several questions regarding the regulation of rates for equipment and for installations. Specifically, it:

* affirms the decisions regarding the type of equipment regulated with the basic service tier;

* affirms the application of the "actual cost" standard to cable programming service equipment and installations;

* holds that a cable operator's sale of equipment is unregulated when the cable operator provides subscribers the opportunity to lease the same equipment at regulated rates;

* affirms the application of the actual cost standard to additional connections;

* rejects several proposals to amend the guidelines for determining the "actual cost" of equipment on FCC Form 393, Part III; and

* provides some clarifications regarding the use of Form 393.[9]

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[8] Additional arguments regarding refunds and issues relating to the certification process and procedural requirements are not resolved in this Order. These include whether the Commission should regulate basic rates in the absence of some affirmative action by the local franchising authority, voluntary decertification, refund adjustments to account for franchise fees, whether refund liability can legally extend back to the effective date of the rules (September 1, 1993 for all but small systems), conflicts between federal and state/local FOIA laws, and means of compliance with the requirement to supply franchise authority information to subscribers when monthly bills are not set out. Each of these issues will be taken up in the next reconsideration Order.

[9] A few matters, such as questions regarding permissible charges for service changes and proper accounting for promotions and for home wiring, will be addressed in the next reconsideration

5) With regard to the guidelines and the procedures for determining whether or not a cable system is subject to effective competition, this Order:

* provides that where a cable system has elected not to serve parts of a franchise area, those parts will not be considered when defining the franchise area for purposes of the first statutory effective competition test; and

* reiterates that data regarding levels of subscription, used to establish the presence or absence of effective competition, can be provided by competitors in the aggregate.

5. Petitions concerning rules applicable to cable service generally are not addressed herein. These include questions concerning the requirement that cable systems have a geographically uniform rate structure, especially as regards bulk discounts and systems subject to effective competition; questions whether certain practices constitute evasions of the rules; the grandfathering of certain rate agreements; and subscriber bill itemizations. Questions regarding all aspects of the rules to govern leased access channels will also await resolution in the next reconsideration Order.

6. This Order also resolves the Further Notice by concluding that systems with less than 30 percent penetration should continue to be included in the universe of competitive systems used to develop benchmark rates. This result is dictated both by the clear statutory language, which defines such systems as being subject to effective competition, and by the absence of any compelling policy reason to exclude these systems from our analysis. In the Third Notice of Proposed Rulemaking, we seek comment on several critical issues, including: (1) how to apply the benchmark methodology when a cable system adds or deletes channels on a going-forward basis; (2) whether cable systems that completed rebuilds immediately before regulation, and whose rates are below the benchmark level, should be permitted to raise their rates to the benchmark; (3) whether cable operators should be required to use a consistent rate-setting approach (either benchmark or cost-of-service) for all regulated tiers of service; and (4) how systems upgrades required by local franchise agreements should be handled under the benchmark/price cap approach.

III. ORDER ON RECONSIDERATION

Order.

A. BENCHMARK ISSUES

1. Background

7. The Notice in this proceeding sought comment on several possible bases for setting rates for regulated cable systems, including: rates charged by systems facing effective competition; systems' past regulated rates; the current average rates of cable systems; and the average or typical costs of providing cable service. To aid in designing an appropriate rate-setting structure, the Commission obtained information concerning current rates, past rates, and system characteristics from a random sample of approximately 300 cable systems and from 141 systems that appeared to be subject to effective competition, as defined by the statute. This competitive sample included systems facing widespread direct competition from rival multichannel video service providers (both commercial and municipal) and systems with penetration rates below 30 percent.[10]

8. The industry survey confirmed Congress' conclusion, reflected in the 1992 Cable Act, that the average rates of systems not subject to effective competition exceed those of systems subject to effective competition. Analysis of the survey data revealed that this "competitive differential" was approximately 10 percent on an industry average.[11] Based on the statute and the survey results, the Rate Order concluded that the reasonableness of rates for the basic service tier, and the unreasonableness of rates for cable programming services, should

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[10] Section 623(l)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Section 543(l)(1) provides in pertinent part:

The term "effective competition" means that--
(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
(B) the franchise area is--
(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or
(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area.

[11] Rate Order at para. 14, n.29.

both be determined by reference to rates of systems facing effective competition.[12]

9. Accordingly, the Commission adopted a "benchmark" approach to project for any regulated system the rates that would be charged by a similarly situated system operating in a competitive marketplace.[13] This approach will be used to set operators' initial rates. A system's actual rates that are at or below the competitive level, as determined by the benchmark formula, on the date of initial regulation will be deemed reasonable; actual rates above the benchmark-derived level will be presumed unreasonable, and must be reduced unless justified in a cost-of-service showing.[14]- Such rates above the benchmark must be reduced up to 10 percent from September 30, 1992 levels,[15] (or until they reach the benchmark, if that is less than a 10 percent reduction), in order to recapture for subscribers the competitive rate differential found to exist on an industry-wide basis.[16] This same benchmark formula and rollback liability applies to all regulated tiers of service, although the rules with respect to cable programming service are triggered by the filing of a complaint.

10. Petitions for reconsideration, oppositions and replies have been filed by numerous parties challenging (and supporting) various aspects of the benchmark regulations, and comments and reply comments have been filed regarding the use of low penetration systems in the competitive sample. In addition, some of the parties seeking reconsideration of the Rate Order also addressed the issues raised in the Further Notice. Issues such as the use of a benchmark and rollback methodology for setting

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[12] Id. at paras. 205 and 387.

[13] The benchmark formula takes into account the three system variables found by the Commission's statistical analysis to have the most significant effect on the prices of the surveyed systems -- the number of subscribers, regulated channels, and regulated satellite-delivered signals. Id. at para. 210.

[14] Id. at para. 213. After a cable system's initial rates are established, its subsequent rate increases are governed by a price cap mechanism designed to keep rates at a reasonable level. This price cap mechanism is further discussed at para. 87-123, infra.

[15] Any required reduction must be taken from the system's rates as of September 30, 1992 in order to ensure a proper comparison to the benchmark and protect subscribers from potentially unwarranted rate increases since that date. Rate Order, at para. 396.

[16] Id. at para. 217.

rates, having a competitive rate as our goal in rate-setting, the propriety of using only "competitive systems" as defined in the statute to determine competitive rates, and compliance with the Administrative Procedure Act are disposed of in this Rate Reconsideration.[17]

2. Discussion

a. Effective Competition as Primary Factor

11. Various petitioners challenge the Commission's primary reliance on competitive rates in setting the benchmark rates. These petitioners contend that the Commission did not take into account the other factors listed in Sections 623(b) and (c) of the Communications Act for consideration in setting rates,[18]

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[17] Concerns about the accuracy of the random and competitive sample data used in constructing the benchmarks and the methodology and statistical analysis that were used in constructing the benchmarks, as well as some petitioners' specific suggestions of other variables they believe should be significant in the benchmark formula, will be addressed in the next reconsideration Order.

[18] Section 623(b), regarding basic service tier rates, provides in pertinent part that the Commission:

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchise authorities, and the Commission;
(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and
(C) shall take into account the following factors:
(i) the rates for cable systems, if any, that are subject to effective competition;
(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;
(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;
(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier;
(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental

including, for instance, the factors of reasonable profits for cable operators or rates charged by similarly-situated systems. Moreover, they argue, such cost variables as system size, geographic location, and franchise and programming costs were not considered. Other petitioners contend that other sources of revenue such as advertising and shopping channels were not taken into account.

12. After reviewing petitioners' arguments, we conclude that the Rate Order properly placed primary weight on rates of systems subject to effective competition in fashioning the benchmark approach. Congress' findings, the overall structure of the Act, the statutory goal for the basic and cable programming service tiers, and the statutory factors for rate determinations all point to a strong congressional intent that cable subscribers should pay rates consistent with a level of rates that would

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entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4) to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

Section 623(c), regarding cable programming services rates, provides in pertinent part that:

[T]he Commission shall consider, among other factors:

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenue (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

prevail if their systems were subject to effective competition.[19] Additionally, and significantly, while we ultimately based the rate-setting methodology on the rates and other characteristics of competing systems, we took all of the statutory factors into account when developing this rate regulation scheme. In this regard, it is necessary to consider the various rate regulation mechanisms employed -- benchmarks, cost-of-service showings and price caps -- not in isolation, but as part of a regulatory system that incorporates the various statutory factors.

13. For example, petitioners overlook the fact that competing businesses must charge rates that are designed to cover all relevant costs and to provide for a profit in order to remain in business. Thus, when the Commission bases benchmark calculations on the rates charged by firms subject to effective competition, it effectively accounts for the costs of providing service for those systems, and also the need for any viable company to earn a "normal" or "competitive" rate of return.[20] Also, the rate-setting formulation considered those variable system characteristics which statistical analysis showed to be the most significant, by including them in the benchmark formula.[21] The other statutory factors are provided for in the price cap allowances.[22] To the extent that petitioners are arguing that the Commission must take into account each individual system's costs and profit in setting its rates, that can be accomplished through a cost of service showing, for which the Commission has provided.[23] In sum, however, the Commission's benchmark rates are designed to adhere not only to the statutory factors but also to the Act's mandate that the administrative burden on all parties be reduced to the extent possible.[24] Primary reliance on a benchmark formula based on competitive rates, as an initial means of determining regulated cable rates, with supplemental reliance on cost of service showings, is thus a reasonable approach and is consistent with provisions of the Cable Act of 1992.

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[19] Communications Act, Section 623 (b), 47 U.S.C. Section 423 (b); Rate Order at paras. 14, 15, 180, 205.

[20] Rate Order, at para. 387 n. 946.

[21] Id. at para. 400 n. 976; Communications Act, Section 623 (b)(2) and (c)(2); 47 U.S.C. Section 543 (b)(2) and (c)(2).

[22] Rate Order, at para. 254; Communications Act, Section 632 (b)(2) and (c)(2), 47 U.S.C. Section 543 (b)(2) and (c)(2).

[23] Rate Order, at para. 264.

[24] Id. at para. 262; Communications Act, Sections 601 (1), and 623 (b)(2)(A), 47 U.S.C. Sections 521 (1) and 543 (b)(2)(A).

b. Application of the Benchmark Rates

14. Several petitioners seek reconsideration of certain specific aspects of the benchmark approach. For instance, some petitioners seek to allow systems with rates below the applicable benchmark rates to raise their rates up to the benchmark level. They contend that otherwise, the "good actors" that kept rates low before regulation will be "punished" because they may have to remain below the benchmark indefinitely. As stated in the Rate Order, however, the decision to cap the rates of operators already below the benchmark was based on the assessment that such below-benchmark rates were reasonable to each such cable system, since it voluntarily selected that rate level before regulation began.[25] Accordingly, unless the operator was acting irrationally, its chosen rate level presumably enables it to recover its costs (which most likely are lower than average).[26] Petitioners do not challenge this assessment or provide evidence that its assumptions are unfounded. In any event, as with all cable systems subject to regulation, if any operator's below-benchmark permitted rates are no longer sufficient to cover costs, it may initiate a cost of service showing.

15. Other petitioners argue that noncompeting systems with rates above the benchmark are being treated differently than competitive systems that have rates above the benchmark. Noting that the noncompeting systems will have to reduce their rates while the systems subject to effective competition will not, they claim that such different treatment of two similarly situated classes of systems is impermissible. However, these two classes

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[25] We assume that our benchmark is compensatory for systems that were rebuilt or upgraded before regulation began. We recognize, however, that some cable operators with below-benchmark rates may have foregone needed rate adjustments, such as after a system upgrade, to avoid subjecting subscribers to immediately sharp rate increases in anticipation of a series of more gradual rate changes over time. As a transitional step, we will consider permitting, on an individual basis, such operators to increase rates up to benchmark levels upon a particular showing that their are rates below the benchmark and that the onset of rules disturbed a preexisting business plan to recoup system costs over an extended period. We seek comment on this proposal in para. 145, infra.

[26] Id. at para. 232. This approach is consistent with our assessment, not challenged by petitioners, that systems whose rates are well above the benchmark level should be required to reduce those rates by a maximum of 10% (the competitive differential), at least initially, since we will assume that such systems may face higher than average costs and thus should not be required to reduce rates all the way to the benchmark. Id.

of systems are not similarly situated. A competitive system can be presumed to be charging a competitive, "reasonable" rate by virtue of the presence of competition, whereas a system free of competition, enjoying market power, cannot be presumed to be charging a competitive rate, as illustrated by our data sample and analysis.[27] The reasonable competitive rate for such a system can only be surmised by reference to the benchmark and rollback provisions derived from the sampling and analysis of the rates of competitive and non-competitive cable systems. The statute clearly states that systems that are subject to effective competition, as defined in the statute, may not have their rates regulated by the Commission or the local franchise authority.[28] Thus, the 1992 Cable Act expressly provides for the different treatment of these different classes of systems. To the extent commenters are raising questions concerning the fact that the benchmark is based on average rates of systems subject to effective competition, these questions will be addressed in the Second Order on Reconsideration.

c. Compliance with the Administrative Procedure Act

16. Some petitioners contend that the Commission has violated the Administrative Procedure Act in connection with its adoption of benchmark rules by failing to give adequate notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[29] They claim that the benchmark rates established in the Rate Order are not a logical outgrowth of the rulemaking process. They further claim that parties did not have notice or opportunity to comment on the basic aspects of the methodology that would be used to determine the benchmark. For instance, they claim that none of the following items were disclosed in this proceeding until the Rate Order: (1) the statistical tool or model that would be used in the regression analysis; (2) which factors would be significant in determining rates; (3) the assumptions that would be made in connection with creating the benchmark; (4) the adjustments that would be made to data; and (5) the treatment of uncertainty in the statistical results.

17. The courts have long held that in applying 5 U.S.C. Section 553(b)(3), the notice requirement is satisfied so long as the content of the agency's final rule is a "logical outgrowth"

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[27] Rate Order, at Appendix E.

[28] Communications Act, Section 623(a)(2), 47 U.S.C. § 543(a)(2).

[29] 5 U.S.C. Section 553(b)(3).

of its rulemaking proposal.[30] Moreover, the focus of the "logical outgrowth" test has been "whether ... [the party], ex ante, should have anticipated that such a requirement might be imposed."[31] Furthermore, the "[n]otice need not contain every precise proposal which the agency ultimately may adopt as a rule. Rather notice is sufficient if the description of the 'subjects and issues involved' affords interested parties a reasonable opportunity to participate in the rulemaking."[32] If an agency were forced to adopt only rules as they were originally proposed, it would result in an interminable step-by-step process of a new notice and comment each time the rules slightly deviated from the original proposal.[33]

18. The Notice went into considerable detail describing the proposals for creating a benchmark for cable rates and soliciting comments from parties.[34] Indeed, the proposal ultimately adopted by the Commission, *i.e.*, benchmark rates based on rates charged by systems facing effective competition, was extensively discussed in the Notice.[35] Notification was given that, to the extent sufficient data was available, regression analysis or some other statistical technique could be used to determine how rates varied due to different characteristics. Petitioners thus had an opportunity to comment on the very form of benchmark ultimately selected by the Commission. While it is true that the precise benchmark formula was not included in the Notice such specification was impossible until the Commission conducted its statistical and regression analysis. However, the sample database was released to the public and an opportunity for public comment on the data was provided.[36] The choice of the specific statistical method in calculating the benchmark rates is

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[30] See, e.g., Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991) and United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

[31] Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

[32] Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission, 650 F.2d 1235, 1248 (D.C. Cir. 1980) ("Trans-Pacific").

[33] Trans-Pacific, 650 F.2d at 1249.

[34] Notice, *supra* at paras. 520 - 23.

[35] Id. at 521.

[36] Public Notice No. 31934, released February 24, 1993.

an appropriate matter for agency discretion.[37]

19. Petitioners further argue that the Commission failed to give "a concise general statement of [the rule's] basis and purpose," because the Commission did not explicitly address certain comments.[38] This argument, however, must also be rejected. "This section has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial."[39] The Rate Order took into account all significant comments concerning the establishment of benchmark rates.

20. Finally, some petitioners contend that the Commission did not respond to concerns raised by commenters that the data from overbuild systems was skewed because of price wars and that there were flaws in the data identified by NCTA. However, NCTA did not indicate in its original comments, and does not indicate in its petition for reconsideration, what effect, if any, the alleged errors in the sample data base would have in computing the benchmark rates. Accordingly, the Commission did not ignore any relevant factors in its decision.[40]

B. DEFINITIONS AND FINDINGS OF EFFECTIVE COMPETITION

21. Under the 1992 Cable Act, the rates of a cable system may be regulated only if the system is not subject to "effective competition." The Act provides that effective competition is presumed to exist if any one of three tests is fulfilled.[41] The Rate Order set out the rules interpreting and implementing these statutory tests, and explained how various new video programming distribution services would be considered under the relevant tests. Several parties have requested reconsideration of discrete aspects of these rules.

1. Low Penetration Systems.

22. Under the first statutory test, effective competition exists if "fewer than 30 percent of the households in the

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[37] See BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 655 (1st Cir. 1979).

[38] 5 U.S.C. Section 553(c).

[39] Thomas v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984).

[40] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

[41] Communications Act § 623(l), 47 U.S.C. § 543(l).

franchise area subscribe to the cable service of a cable system."[42] The Commission adopted a rule repeating almost *verbatim* the language of the statute and stated that, for purposes of applying this rule, the subscribership of each cable system in a franchise area will be measured separately and not aggregated with other systems.[43]

23. Several groups of franchising authorities urge the Commission to define the term "franchise area" for purposes of the first effective competition test as "the area within a franchising authority's jurisdiction that an operator is required to service or that it in fact serves" or as the de facto (homes passed) rather than de jure (authorized) franchise area. In response, several cable operators contend that this approach conflicts with the express language or plain meaning of the statute and thus may not be adopted by the Commission.

24. Notwithstanding the concerns expressed by franchising authorities regarding the coverage of this statutory provision, we are not in a position to alter the plain language of the statute through our regulations. The term "franchise area" is used for a variety of purposes within the statute[44] and our rules and has a commonly understood meaning in the industry and in regulatory parlance. A franchise area is the area a system operator is granted authority to serve in its franchise. Thus, the substitution of a "homes passed" for "homes in the franchise area" test does not appear to be consistent with the plain language of the statute. Moreover, because franchise authorities themselves have both the authority to define the area to be served[45] and anti-"redline" authority[46], they are not without the

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[42] Communications Act, Section 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A).

[43] Rate Order at para. 18; 47 C.F.R. § 76.905(b)(1).

[44] The same terminology, for example, is used in the second and third effective competition tests, in the SMATV and MMDS cross-ownership restrictions (Section 613(a)), and in the franchise award (Section 621(a)(4)) and renewal provisions (Section 626(a)(1)).

[45] Section 621(a)(4) states that: "(4) In awarding a franchise, the franchising authority -- (A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."

[46] Section 621(a)(3) provides that: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential subscribers because of the income of the residents of the local

ability to themselves address some of the concerns raised in the reconsideration petitions.

25. We do believe, however, that there may be some limited situations (such as, for example, where a system operator has county-wide operating rights but has determined to serve only a specific named community within that area) where use of a more restricted "franchise area" definition may be both appropriate and consistent with the statutory language. An affirmative decision by a system operator to restrict service logically redefines its franchise area in terms of the objectives of this provision. Accordingly, we will permit franchise authorities to demonstrate the boundaries of such a redefined franchise area. Such a showing, however, will be limited to situations in which a system operator has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's "franchise area." The fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area.

2. Procedures Regarding Effective Competition Demonstrations.

26. A cable operator is presumed not to be subject to effective competition and carries the burden of rebutting this presumption with evidence of the presence of effective competition as defined in the Act. To obtain access to information necessary to rebut this presumption, cable operators may request from a competitor information regarding the competitor's reach and penetration, if such information is not otherwise available.[47] The rule requires that competitors must respond to such requests within 15 days, and that responses may be limited to numerical totals.

27. One petitioner alleges that some cable operators are requesting that competitors reveal, pursuant to the above rule, specific subscriber information, including lists of subscribers and their addresses. As stated in the Rate Order, however, "responses may be limited to the numerical totals needed to calculate the distributor's reach and penetration in the franchise area."[48] A competitor need only supply these aggregate totals. Lists of subscribers and their addresses clearly do not fall into this category and should not ordinarily be disclosed. If cable operators are alleged to have abused their right to

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area in which such group resides."

[47] 47 C.F.R. § 76.911(b)(2).

[48] Rate Order at para. 44.

request effective competition data from a competitor, the Commission will, as indicated in the Rate Order, deal with such situations on a case-by-case basis."

28. A joint petition filed on behalf of several cable MSOs expresses concern that some cable operators may not be able to demonstrate the presence of effective competition in sufficient time to stay a franchising authority's certification to regulate basic cable rates, because competitors may not respond to requests for information on their penetration and reach within 15 days. The petitioners are concerned that these competitors have no incentive to cooperate with cable operators and that there is no enforcement mechanism for this rule.

29. We believe that cable's competitors generally should be able to comply with requests for aggregate data on reach and penetration within the required 15 days. Since such information is likely critical to a competitor's billing and marketing efforts, it should be readily available. The joint petitioners mere speculate that competitors will intentionally withhold or delay providing information; there is currently no evidence of such conduct. Moreover, many of the most significant competitors to incumbent systems, such as other cable systems and MMDS systems, are either licensed or regulated in part by the Commission, and enforcement proceedings thus can be instituted against them should they deliberately fail to respond as required. And, as indicated in the Rate Order, if unresponsiveness does threaten to become a prevalent problem, the Commission could require periodic reporting from all competitors.

30. Finally, relief can be provided to cable systems in individual cases of unresponsiveness as necessary and appropriate. Such relief could consist of an extension of time to file a petition for reconsideration challenging a franchising authority's certification. Alternatively, an operator can file a request for revocation of a franchising authority's certification pursuant to Section 623(a)(5) of the Communications Act, even after the time for filing reconsideration of a franchising authority's certification has passed.

C. TIER NEUTRAL RATE-SETTING METHODOLOGY

31. In the Rate Order, the Commission adopted a tier-neutral framework for rate-setting that is the same benchmark formula and rollback requirements are to be applied to basic tier services and to cable programming tier services. It concluded that the Act's directions, on the one hand, to "ensure that rates

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" Id.

for the basic service tier are reasonable,"[50] and, on the other hand, to "establish ... criteria for identifying, in individual cases, rates for cable programming services that are unreasonable,"[51] merely reflect the different procedural schemes Congress adopted for these different tiers -- that is, basic tier rates are to be pre-approved by local franchise authorities and cable programming tier rates are to be addressed by this Commission and only when challenged by a complainant.[52] Some parties had argued that different regulatory schemes were required for basic cable and cable programming services because the factors listed in the Act to be considered in determining the appropriate rate level for each tier differed somewhat. The Commission held, however, that the differently stated factors did not mandate different rate-setting approaches, but rather could accommodate the same rate standard for both tiers if that standard adequately balanced, and took into account, the respective factors for each tier.[53] Moreover, the benefits of tier neutrality were found to outweigh other considerations that would favor adoption of different rate standards for the basic and cable programming service tiers.[54] Specifically, the tier-neutral approach removes any incentive for moving programming from the basic to cable programming service tiers, or *vice versa*, and reduces the administrative burdens on cable operators and regulators by greatly simplifying the rate-setting process.[55]

32. A number of petitioners, primarily cable operators, reiterate their arguments that rates for basic and for cable programming service tiers should be regulated by different standards, given the different factors for consideration stated in the Act. But these petitioners offer no new insight on this analysis. Their arguments were fully considered and rejected in the Rate Order and are not extensively reanalyzed here. Accordingly, we deny their requests for reconsideration of our decisions on this issue. A few petitioners, however, have raised new arguments that we will now address.

33. Time Warner and Newhouse contend that, because the tier neutral scheme averages all tier costs into an initial average per-channel rate, it violates the statutory directive

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[50] Communications Act, Section 623(b), 47 U.S.C. § 543(b).

[51] Communications Act, Section 623(c), 47 U.S.C. § 543(c).

[52] Rate Order at para. 389.

[53] Rate Order at para. 389 and n. 949.

[54] Id.

[55] Rate Order at paras. 196-197.

that the Commission take into account only those joint and common costs that are properly allocable to the basic service tier when developing rate standards for that tier.[56] This argument is unavailing. This statutory provision provides that only a reasonable allocation of joint and common costs should be allocated to the basic service tier, but leaves to the Commission's discretion the determination of what is a reasonable allocation. The benchmark methodology uses per channel rates established by averages, but it then multiplies that per-channel rate by the number of channels in a given tier in order to establish the permissible rate for that service tier. This approach provides a reasonable allocation of rates (and presumably costs) in that it is in direct proportion to the level of service provided on each tier, as measured by the number of channels of service supplied to the subscriber. If petitioners' argument is meant to assume that non-basic tier costs are higher than basic tier costs, they do not demonstrate that this is necessarily the case. Moreover, one reason for the adoption of tier neutrality was to eliminate any incentive for operators to move services to other tiers where they could charge relatively higher prices without necessarily corresponding higher costs.[57]

34. Booth contests the Commission's premise that allowing operators to charge relatively more for cable programming services would result in a "stripped down" basic tier, and insists that the Commission has no evidence of this. Our longstanding experience with rate regulated companies, however, has taught us that such entities have every incentive to maximize revenues to the extent permitted by regulation.[58] In the instant case, it is entirely likely that a cable operator who could maximize revenue by moving programming services to the tier that enabled him to charge the highest per channel rate would do so. It is well within our discretion to make such predictive determinations, Booth's contrary claims notwithstanding.[59] Moreover, some record evidence indicates that operators were in fact retiering in anticipation of the adoption of rate regulations.[60]

35. Affiliated and Liberty argue that the tier-neutral

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[56] Communications Act § 623 (b)(2)(c)(iii) 47 U.S.C. § 543(b)(2)(C)(iii).

[57] Rate Order at para. 196.

[58] See cases cited at n.204, infra.

[59] FCC v. National Citizens Committee on Broadcasting, 436 U.S. 775, 814 (1978).

[60] See Austin Reply Comments at 10-11.

scheme creates an incentive to offer on a per-channel basis the programming now offered on tiers, noting that such *a la carte* programming is not regulated by the Cable Act. However, any such incentive to avoid regulation of the rate for a programming service (or services) is created by the statute itself and occurs irrespective of tier neutrality in rate setting. Even in the absence of tier neutrality, rates on all tiers would be regulated to "reasonable" competitive levels. The desire to avoid such regulation would seem primarily a function of the actual rate permitted under the regulation. Additionally, restructuring program offerings to provide more *a la carte* services is not *per se* undesirable, as offering programming on a per-channel basis increases consumer choice, which is one of the goals of the Act.[61] Moreover, as noted in the Rate Order, it is not clear that operators, as a business matter, have unlimited ability to shift programming from tiers to per-channel offerings.[62]

36. Finally, Northland and Affiliated Regional Communications contend that tier neutrality eliminates any incentive to carry high-quality programming as part of a regulated offering. This argument, however, ignores the fact that the benchmark calculation is based on the rates of operating (and thus presumably viable) cable systems subject to effective competition, which incur programming costs, including the costs for high-priced programming services. Also, high-priced programming should have some value to the system from a marketing, penetration, and customer satisfaction standpoint in order to justify its carriage; any exceptional price can be offset by the numerous lower-priced and no charge programming services carried by cable systems. To the extent new program services may come at a relatively high price, their treatment is addressed in the Third Further Notice of Proposed Rulemaking. Finally, as a regulatory matter, the operator retains the option to offer any or all programming on an unregulated per-channel basis, or to submit a cost-of-service showing rather than rely on the benchmark approach. Accordingly, these petitions for reconsideration of the tier neutral methodology for rate setting will be denied.

E. RATE REGULATION OF EQUIPMENT AND INSTALLATIONS

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[61] See, e.g., H.R. Rep. No. 628, 102d Cong., 2d Sess. at 90 (1992) ("House Report") ("[p]er channel offerings available to subscribers ... can enhance subscriber choice and encourage competition among programming services"); S. Rep. No. 92, 102d, 1st Sess. at 77 (1991) ("Senate Report") (noting that unbundling allows subscribers to choose only those programs for which they wish to pay).

[62] Rate Order, at n. 1161.

37. Section 623(b)(3) of the Communications Act requires the Commission to establish standards, based on actual costs, for the rates charged for equipment and installation used to receive basic cable service on one or more outlets. Pursuant to Section 623(c) of the Communications Act, the Commission also must establish criteria to determine whether rates for cable programming services, including the installation and rental of equipment used to receive such programming, are unreasonable. This section addresses petitions for reconsideration discussing the equipment to be regulated, the manner in which rates charged for equipment and installations shall be determined and the relevant entries on Form 393 for calculating such rates.

1. Equipment Covered By Basic Service Regulation

38. Section 623(b)(3) directs the Commission to establish standards for setting, on the basis of actual cost, the rate for lease of equipment used by subscribers to receive the basic service tier, including converter boxes and remote control units, and lease of monthly connections for additional television receivers.[63] The Rate Order stated the Commission's belief that Congress intended the actual cost standard to apply broadly to all equipment used to receive the basic service tier, even if it is also used to receive other cable services.[64] The Commission concluded that Congress' decision to change the terminology from "equipment necessary by subscribers to receive the basic service tier," found in the House Report, to "equipment used by subscribers," (emphases added) found in the Conference Report and adopted in the Act, was significant and was specifically intended to broaden the class of equipment subject to regulation on an actual cost basis.[65] The Rate Order also concluded that Congress had decided that equipment would be regulated unless a finding was made that the entire cable system was subject to effective competition.[66]

39. Several petitioners, primarily cable operators, seek reconsideration of the Commission's broad reading of "equipment used to receive the basic service tier." These parties argue that only certain fundamental equipment used to receive the basic service tier, and not equipment whose use for basic service, is only incidental to its primary purpose, should be regulated

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[63] Communications Act § 623(b)(5) 47 U.S.C. § 543(b)(3).

[64] Rate Order at para. 283.

[65] The Conference Report noted that "this change gives the FCC greater authority to protect the interests of the consumer." Conference Report at 64.

[66] Rate Order, at para. 282.

pursuant to the "actual cost" standard specified in Section 623(b) of the Communications Act. Under this approach, equipment installed when the subscriber chooses to have access to cable programming services would be regulated under the "not unreasonable" standard in Section 623(c) and equipment used to access unregulated per-channel or per-program services would remain unregulated, even if that equipment also accesses signals on the basic service tier. The petitioners argue that, when substituting the phrase "used" to receive the basic service tier for the phrase "necessary" to receive the basic service tier, Congress merely intended to broaden the language in the Act so as to include remote control devices and other ancillary equipment used by basic subscribers which might not be considered "necessary" for basic service. Several cable operators contend that, if Congress intended all equipment to be priced on the "actual cost" standard, the Cable Act would not have specifically referred to descrambling equipment used to receive pay services by a basic-only subscriber. These parties argue that our interpretation of the Act makes this reference in Section 623(b)(3)(A) superfluous because such equipment would already have been included under the actual cost standard.

40. Further, some petitioners note that regulating as part of basic service the equipment used to deliver cable programming services or pay services renders meaningless Congress' decision to add equipment and installation to the definition of cable programming service.[67] In this regard, Cablevision states that if Congress intended a broad reading of "equipment used to receive the basic service tier," it would not have chosen to include equipment in the definition of cable programming services. In contrast, NATOA believes that the Commission is correct in subjecting equipment "used" to receive basic service to actual cost regulation regardless of whether it is also used to receive any other programming service.

41. We affirm our prior conclusion that Congress intended the actual cost standard to apply broadly to all equipment used to receive the basic service tier. Notwithstanding petitioners' reiteration of their prior arguments, we continue to believe that the interpretation in the Rate Order of the legislative history, including the changes in the language in Section 623(b) and in the definition of cable programming service is correct.[68]

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[67] Conference Report at 66.

[68] We also note that the provision in Section 623(b)(3)(A) subjecting to actual cost regulation the addressable converters needed for a basic-only subscriber to receive pay services was included to ensure that "buy-through" protection would not be circumvented by high equipment rates. We thus reject petitioners' argument that the inclusion of addressable converters in that

Moreover, we note that if we were to adopt a narrow interpretation of "used to receive the basic service tier," as advocated by several of the petitioners, only a small percentage of equipment would be subject to regulation under the "actual cost" standard specified in Section 623(b) of the Communications Act. According to April 1993 estimates, 74 percent of cable households receive some per-channel service along with basic cable.[69] Many of these subscribers use converters to receive their pay services, the rates for which would not be regulated under petitioners' interpretation of the Act.[70] It is thus apparent that adoption of petitioners' approach would result in a significant amount of unregulated equipment, thereby undermining Congress' concern over the high rates charged for cable equipment.[71]

42. We further observe that Congress intended that our regulations establish equipment rates similar to those that would exist in a competitive environment. Under the "actual cost" standard, cable operators recover their costs including a reasonable profit. This will result in rates comparable to those that would exist in a competitive environment, thus subjecting a reasonable amount of equipment to a standard that furthers Congress' intention.

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subsection reveals a congressional intent to significantly restrict the amount and type of equipment that should be subject to the actual cost standard.

[69] See "Cable Television Developments," NCTA, June 1993 at 1-A (citing Paul Kagan Associates, Inc., "Marketing New Media," April 19, 1993 at 4).

[70] We recognize that, pursuant to the "buy-through" provisions of § 623(b), equipment in some of these households will be regulated under the "actual cost" standard. Congress has estimated, however, that only a quarter of all cable systems currently are technologically capable of offering to basic subscribers pay services without "buying-through" intermediate service tiers. S. Rep. No. 102-92, 102d Cong. 2d Sess. (1992), at 77. Moreover, it is unclear how many of the subscribers served by such systems in fact purchase only basic and premium services. Thus, it is entirely possible that the number of subscribers protected by the actual cost standard as applied to their converters is actually very small.

[71] Congress stated that it is "concerned that cable operators have been leasing equipment at rates that far exceed its cost. The purpose of [Section 623(b)(3)] is to require cable operators to price these items fairly, and to prevent them from charging prices that have the effect of forcing subscribers to purchase these items several times over the term of the lease." House Report at 83-84.

43. Some petitioners also argue that an inclusive interpretation of equipment subject to the "actual cost" standard will stifle technological development in subscriber equipment. They claim that this interpretation will discourage innovation by depriving manufacturers and cable operators of the financial rewards commensurate with the risks inherent in the design and development of advanced equipment. Cablevision further asserts that the Commission's failure to exempt from rate regulation converters that add incremental features unrelated to the receipt of cable services, such as handsets for personal communications services and facsimile machines, frustrates the public policy goals of promoting innovation and investment in the design and development of advanced converters and is inconsistent with the Commission's policy with respect to common carriers of permitting the offering of customer premises equipment (CPE) on a deregulated basis.

44. We remain convinced that our regulatory scheme will not stifle technological development. Cable operators are entitled under this section of the Act to recover their costs, and earn a reasonable profit, for any equipment used to receive the basic tier. The revenues they receive thus should approximate their revenues in a competitive market. There is nothing in the record -- nor in the Commission's experience -- which suggests that equipment manufacturers and cable operators need to be able to charge higher than competitive rates in order to develop innovative equipment. To the contrary, this Commission has long held that competition is a spur to technological development, not a hindrance. Moreover, even if a specified piece of equipment is subject to regulation, any services provided using that equipment other than basic service or cable programming services, whether cable-related or not, remain unregulated. Cable operators thus have the option of using revenue derived from unregulated services to cover any equipment-related costs that they do not wish to recover through equipment charges. As noted in the Rate Order, nothing in the Cable Act prevents a cable operator from offering equipment below cost to encourage its use.[72]

45. A number of petitioners argue that where a competitive market for similar equipment exists within the franchise area, such equipment should be unregulated. They contend that this approach is consistent with Congress' intent to rely on the competitive marketplace to the extent feasible, citing Section

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[72] Most technological development in such equipment is conducted by companies that do not own cable systems. See, e.g., Scully, "Cable converters entering new era," Broadcasting & Cable, June 14, 1993, at 79. Under the regulations, cable operators can pass on to their subscribers the full cost of buying such technologically advanced equipment from these companies.

2(b)(2) of the 1992 Cable Act. In opposition, GTE approves of the regulations, asserting that, if properly executed, they will lead to the kind of competition that has emerged in the telephone industry in installation, maintenance, repair, and lease/purchase of equipment.

46. These petitioners merely reiterate arguments considered in the initial decision not to establish a separate effective competition test for equipment, and that decision is affirmed. The Rate Order indicated that the information necessary to establish an effective competition test for equipment and installation is not available at this time, and the petitioners have not provided additional information with respect to creating a standard for determining when the market is competitive. The Commission, recognizing that competition for cable equipment technologies is evolving, will continue to monitor the marketplace and will reexamine this issue at an appropriate time.[73]

2. Application of the Actual Cost Standard

47. Section 623(b)(3) of the Communications Act requires that the rates for equipment and installation used to receive basic service reflect their actual cost. In order to determine the actual cost of equipment and installations, cable operators must unbundle each piece of equipment and must separate equipment from installation.[74] They also must utilize a specific methodology for determining the actual cost of each piece of equipment and installation.[75] Under this methodology, the cable operator must establish an Equipment Basket to which it assigns the direct costs of service installation, additional outlets, and leasing and repairing equipment. In the Equipment Basket, the cable operator must allocate the system's joint and common costs that service installation, leasing, and equipment repair share with other system activities (but not general system overhead), plus a reasonable profit. The guidelines that cable operators

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[73] The Commission is considering how to make available to consumers, either through sale or lease, a variety of equipment that will be compatible with equipment provided by cable operators and will include some equipment designed to compete with that provided by cable operators. See Notice of Inquiry in ET Docket No. 93-7, (Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment), 8 FCC Rcd 725 (1993).

[74] 47 C.F.R. § 76.923(b). See Rate Order at paras. 287-288, 294-298.

[75] 47 C.F.R. § 76.923(d)-(g).

must follow to calculate these actual costs are set forth in FCC Form 393, Part III.[76] Cable operators must also unbundle and apply this actual cost standard to cable programming service equipment and installations to determine whether charges for these items are not unreasonable as required by Section 623(c).[77]

48. NCTA and several cable operators seek reconsideration of the decision to require unbundling and to apply the same actual cost methodology to equipment and installation charges for the basic service tier and for cable programming services.[78] They argue that cable service and equipment are interdependent goods and bundling should be permitted. NCTA and others ask that the Commission allow equipment and installation charges for cable programming services to be above actual costs, as long as overall rates are reasonable, stating that such subsidization will allow cable operators to offer a low cost basic service.

49. These parties merely restate the argument disposed of in the Rate Order that Section 623(c) of the Communications Act sets forth a "not unreasonable" rate standard for cable programming services, including equipment and installation, as opposed to the "actual cost" requirement for the basic service tier, found in Section 623(b). In developing a comprehensive regulatory scheme for rate regulation, however, a tier-neutral benchmark approach was found to best fulfill the stated goals of the Cable Act.[79] Consistent with that decision, the programming portion of cable programming service is subject to the same benchmarks as basic tier programming. Since Congress defined this service with an equipment and installation component, we concluded that an actual cost standard is most appropriate for determining equipment and installation charges, notwithstanding the discretion afforded to select an alternative approach. Although this fundamental decision has been challenged on reconsideration, petitioners have failed to present any alternative methodology we might use when evaluating whether the rates for cable programming service equipment are "not unreasonable." Accordingly, we affirm our decision to use the actual cost standard to measure the reasonableness of rates for cable programming service equipment and installations. This

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[76] Petitions for reconsideration and clarifications relating to the guidelines and specific elements of Form 393 are discussed below.

[77] 47 C.F.R. § 76.922(a).

[78] No petitions for reconsideration address the decisions regarding the unbundling and use of an actual cost standard for the basic service tier.

[79] Rate Order at paras. 396-97.

standard will protect consumers from unreasonable rates and at the same time permit cable operators to earn revenues comparable to those that could be gained in a competitive environment.[80]

50. Petitioners' argument that we not require unbundling of equipment and program service charges also was fully analyzed and rejected in the Rate Order. As we discussed in that decision, an unbundling requirement is the most effective means of ensuring that rates for program services and rates for consumer equipment each meet the separate standards of reasonableness set forth in the 1992 Cable Act and the Commission's Rules.[81] In addition, an unbundling requirement best addresses Congress' concerns that bundling practices have played a significant role in enhancing cable's market power.[82] In view of the petitioners' failure to raise new and persuasive arguments on this issue, we affirm our decision to require the unbundling of program service and equipment rates.

51. Time Warner seeks reconsideration of the decision to apply the actual cost standard to the sale of equipment. It argues that the statute does not address this matter and that the Commission is not empowered to establish such rate regulation. Further, Time Warner contends, this action is not in the public interest, since a competitive market exists for the equipment available for sale. Whether the requirements of Section 623(b)(3) for establishing a "price or rate" for "installation and lease of equipment" includes the sale of such equipment is unclear. However, we decline to exempt from regulation sales of equipment if to do so would merely create a loophole that would allow cable operators to avoid our equipment rules. Section 623(h) empowers the Commission to prevent evasions of our rules, which we believe could occur if operators were free to convert leasing arrangements to "installment sales contracts" and thereby avoid regulation of equipment rates. On the other hand, there is no need for the Commission to regulate the sale of equipment where comparable equipment is available from operators on a leased -- and regulated -- basis. Therefore, we conclude that equipment sales by an operator will be unregulated where the operator offers subscribers the same equipment under regulated leased rates.

3. Additional Connections

52. Section 623(b)(3)(B) of the Communications Act

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[80] A competitive rate is generally one that reflects actual cost including a reasonable profit.

[81] Rate Order, at paras. 287-88 and 410-412.

[82] Id. at para. 411-12.

requires the Commission to establish rate standards, on the basis of actual costs, for installation and monthly use of connections for additional television receivers. The Rate Order stated that the costs associated with additional connections should be included in the Equipment Basket and that operators should recover such costs in the related equipment and installation charges.[83] Equipment and installation charges for additional connections are to be calculated in a manner similar to that prescribed for the primary cable outlet, although it is expected that there will be a smaller charge for installing an additional connection that does not require a separate visit to the subscriber's home.[84] In addition, a cable operator is permitted to recover additional charges, through a monthly charge limited to the operator's additional programming costs, for programming it transmits to additional outlets. Any network costs incurred to facilitate the provision of multiple outlets to subscribers is treated as general system overhead and is to be recovered through program service rates.

53. Several cable operators request that the rules be modified to permit monthly service charges for additional outlets beyond the lease of the additional equipment needed to receive cable service at these additional connections. Parties contend that the Commission erred in interpreting the statute and legislative history to limit additional outlet charges to cover only the lease of the needed equipment. They argue that this approach prevents operators from charging subscribers for the value inherent in the discretionary option of having cable service available at additional outlets. Others, however, argue that where Congress intended for the actual cost standard to apply only to equipment it specifically so stated, and, thus, value-based monthly service charges are not intended for additional connections.

54. The petitioners have raised no new arguments and the Commission's interpretation in the Rate Order of Section 623(b)(3) of the Communication Act, which sets forth the items to be regulated on the basis of actual cost, is affirmed. In paragraph (A) of Section 623(b)(3), equipment is specifically mentioned, while in paragraph (B) of that section the relevant term is "monthly use of connections for additional television receivers" (emphasis supplied). In light of the difference in terminology, it appears that monthly use of connections denotes the receipt of the service at additional home outlets. Thus, there seems to be no basis in the statute for allowing cable operators to charge for the "value" of additional connections

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[83] Rate Order at paras. 306-07.

[84] 47 C.F.R. § 76.923(h).

above and beyond their actual costs.[85] The Rate Order determined that the best method for recovery of such costs is through related equipment and installation charges.[86] Operators may also charge subscribers for any additional programming costs they incur when providing services to additional outlets. In addition, revenue from equipment, including that from additional outlets, was added into the revenue from cable service to determine the rate per-channel that is the basis for the benchmark measurements. The revenue previously received from additional outlets will, under the benchmark regime, now come from per-channel charges for cable service. Therefore, there is an opportunity for cable operators to continue to earn such revenues under the benchmark approach.[87]

55. Petitioners also state that the Commission failed to take into account the costs incurred in designing a cable system capable of providing a signal strong enough to serve multiple outlets in a home. In particular, Time Warner asserts that cable networks have been designed to accommodate an expected number of additional outlet requests, a number that is likely to rise significantly beyond the capability of existing networks if this service must be offered at cost. These cable operators argue that they should have a means to recover the costs of these needed network improvements without the burden of cost-of-service showings. In this regard, Arizona recommends that the Commission permit cable operators to recover the costs of providing additional connections through a modest monthly charge that represents a percentage of the capital expenditures for the network, the capital costs involved with providing the additional outlet and the costs of maintenance of such outlets.

56. Petitioners' claim that their networks are not currently designed to accommodate the increased number of additional connections that will be requested is not substantiated with evidence in the record of this proceeding. Moreover, no party has provided sufficient information upon which we could determine an allowance based on current incremental

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[85] Moreover, even if operators could charge for such value, they do not propose any methodology for determining a reasonable rate based on value.

[86] Rate Order at para. 306.

[87] Because per channel and per program offerings are completely unregulated under the 1992 Act, a cable operator may offer such unregulated programming services at rates that vary with the number of outlets that receive such services in an individual subscribing household.

system costs or future costs resulting from increased demand.[88] Thus, until the demand for additional connections unable to be accommodated is known, no further consideration of this matter is needed. The rules, in general, provide a means to examine individual cases, including through a cost-of-service proceeding. Moreover, should parties provide evidence at a later date to substantiate their claims, the Commission can reevaluate the situation.

4. Guidelines for Determining Equipment and Installation Charges

57. The Commission developed Part III of FCC Form 393 to provide the methodology for calculating the actual costs of equipment and installation charges for cable service in the Equipment Basket. A number of reconsideration petitions address the general guidelines for determining actual cost. Some petitioners also seek modifications of the form or request clarifications regarding its use. In addition, a number of questions relating to the calculation of the actual cost of equipment and installations have arisen since the adoption of the Rate Order.[89] Several of these issues are addressed in turn below.

58. Some cable interests argue that the permitted rate of return of 11.25 percent is too low and has no basis other than its use as the rate allowed local telephone exchange carriers. As evidence that a higher rate is justified, Booth America observes that the average bond yield over the past two years for the cable industry set by the investment community is higher than comparable bonds for local telephone exchange carriers (8-15 percent vs. 7-9 percent). The relative bond yields for different industries, however, is not necessarily correlative to the reasonable rates of return for the regulated segments of those industries. The choice of an 11.25 percent rate of return for regulated cable equipment was based on the Commission's

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[88] Our methodology already accounts for each of the costs that Arizona lists. In addition to the network costs that should be recovered through program service rates set pursuant to the benchmark, the capital costs associated with the additional outlets and the costs of maintenance are reflected in our actual cost standard for equipment and installations.

[89] A Public Notice released July 30, 1993 addressed a number of these questions. See Cable Television Rate Regulation, Questions and Answers Relating to FCC Form 393, Public Notice, July 30, 1993. The relevant answers are repeated here.

experience in rate making.[90] However, the allowed rate of return can be adjusted by the Commission, if the current provision proves to be unfair to either cable operators or to ratepayers. Further, cable operators may apply the rate of return at a rate "grossed up" for income taxes,[91] and the instructions for the calculation of income taxes includable in Column G of Schedules A and C have been revised to reflect this change.

59. A number of cable operators state that the actual cost methodology does not recognize the costs of tax liability attributable to partnerships, Subchapter S corporations and sole proprietorships.[92] They observe that these taxes are not paid by

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[90] In the pending cost of service rate proceeding, the Commission proposed a rate of return range between 10 and 14 percent based on its analysis of the cost of debt and equity in the cable industry. See Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 93-353, released July 16, 1993, at paras. 46-56.

[91] The federal tax rate of 34%, for example, would be grossed up to 51.5%, calculated as 34 / (100 - 34). Or, the 11.25% rate of return would be grossed up to 17.04% to include federal taxes, calculated similarly as 11.25 / (100 - 34).

[92] Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation. All other taxes, including gross receipt taxes, property taxes, and franchise taxes are includable in the cost of service for all entities. Sole proprietors, partners, and Subchapter S corporation (S corporation) shareholders pay only one tax on the earnings they have from their interest in business entities. A sole proprietor does not have an income tax obligation separate from the income tax payable by the individual owner. The income from business is included in the individual return and taxes paid at the individual tax rates. While a partnership files a return, it is not a tax-paying entity. The partnership's income, deductions, and credits are passed through to the partners and are given tax effect on their individual returns at individual tax rates. The S corporation is treated more like a partnership than a corporation for income tax purposes in that it is generally exempt from all federal income taxes. (To the extent that it does pay income taxes, such payment is on passive investment items which generally are not beneficial to ratepayers. To the extent that such tax, or any similar income tax, is on items demonstrably beneficial to ratepayers, we would allow inclusion of such payments in a rate of return filing.) Partnership-like rules allow the pass through of income and loss items to the S corporation shareholders who pay the taxes at individual tax rates. A distribution of earnings to shareholders is treated as a return of shareholders' investment upon which no tax is payable. In contrast to all of the above, a regular

the operator, but by the ultimate owners. However, they claim that these taxes are legitimate costs of providing equipment and services and should be recoverable. These petitioners, however, misconstrue the workings and purposes of these provisions. All taxes, including income taxes for those business entities required to pay income taxes, are taken into account in our actual cost methodology. The provision for income taxes is made to compensate the business entity for a cost of doing business and to allow it thereby to earn a fair after-tax return on investment. Any business with a statutory income tax obligation thus may include the cost of such obligation in its rate calculations. However, because Subchapter S corporations, partnerships, and sole proprietorships do not have an income tax obligation as business entities, this provision is not applicable to them. Accordingly, such entities that do not have income tax obligations would enter zero in Column D of Schedules A and C. For corporations with income tax obligations, the amount included in Column D is based on the "grossed-up" statutory rates, not the tax rate actually paid.

60. Arizona asserts that the methodology for determining monthly equipment charges depends on the extent to which equipment has been depreciated. It claims the original cost cannot be recovered over its remaining useful life in some situations and suggests that cable operators be allowed to calculate the monthly equipment lease charge using a *pro forma* methodology that permits recovery of original costs. Baraff states that Form 393 appears to permit an operator to include equipment and service not previously offered." However, it

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corporation (C corporation) is a tax-paying entity. And while our intent is not to grant relief for double taxation, the fundamental difference with respect to income taxes between a C corporation and these other entities is readily observed in the fact that C corporation owners effectively pay two taxes on business entity profits, once at the corporate level and a second time at the individual level on the dividends received. Sole proprietors, partners, and S corporation owners pay one tax only and that at the individual level.

" Baraff also states that Line 104 requires all equipment revenue to be included, even though the inclusion of revenues from unregulated services artificially inflates the regulated rate. The Line 104 instructions, however, are correct as stated because they are consistent with our methodology for calculating the benchmark. While it might have been preferable to have calculated the benchmarks with the unregulated equipment revenues excluded, the data used to establish the benchmarks did not include the necessary information to proceed in this manner. Moreover, because the benchmarks included revenue from unregulated equipment, they too are "artificially inflated" under Baraff's approach. Thus, any

observes that the form relies on historical data for determining a permitted rate and seeks clarification that an operator may use prospective costs where it anticipates offering new equipment.

61. The methodology specified for development of rates for leased equipment is dependent to an extent on the amount of accumulated depreciation associated with each equipment type. This is necessarily so because it is assumed that recovery has already been attained for that portion of plant for which depreciation has been taken and no provision should be made for recovery beyond the cost of the plant. This assumption is founded on the expectation that operators use standard accounting practices, which would employ depreciation lives commensurate with the economic productivity of assets and would thus match the costs of the plant with the revenues generated by the use of such plant.

62. The equipment rates, however, are not dependent on the accumulated depreciation balance alone. As a result, the rates for one operator with a higher proportion of accumulated depreciation will not necessarily be lower than another operator with a lower proportion of depreciation. For example, if all factors except age are equal, including original cost and useful life of equipment, the rates should be the same for both operators. The one with the newer equipment and, therefore, lower accumulated depreciation will simply be allowed to charge customers for a longer period until full recovery is attained.

63. To the extent that systems have failed to recover amounts now reflected in accumulated depreciation, the amount would be reflected in the system's accumulated loss. It is recognized that the failure to make recovery and the accumulation of losses result from policies involving business strategies put in place before the introduction of regulation. Comment has been sought on the need to make special provision for such losses in a separate cost of service proceeding."[94] Whatever the result of that inquiry, the procedures for rate development for equipment should apply sound ratemaking principles and assume good accounting practices. Recovery of past shortfalls will be considered as a separate item.

64. In establishing the rules for the pricing of equipment, we intended that operators would have a methodology

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harm to operators that may have been caused by including unregulated equipment revenues when calculating a system's actual rate is offset by the fact that such revenues were also included in the benchmark calculations.

[94]Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 93-353, released July 16, 1993, at fn. 44.

for pricing leased equipment in such a way that would effectively allow recovery of full cost over the equipment life. In theory, then, a piece of equipment would be fully paid for just when it is ready for retirement and new equipment must be installed. Recalculation of rates for each equipment type is allowed annually and customer charges should be adjusted up or down based on the recalculation. As newer models are employed, a separate rate shall be developed. In such case, when the new model is introduced during the interim, a rate may be calculated and used until the annual recalculation is made. Alternatively, however, where the operator expects eventually to replace the older model upon retirement with a newer model that is not significantly different, operators may phase the new equipment in by developing a weighted average rate for both the new and old items."[95]

65. A few petitioners request clarification or modification to allow use of data averaged on a system-wide or accounting unit basis throughout Form 393, not just in selected places, to alleviate some of the burdens of completing the form. Form 393 does not actually specify the level of averaging that is allowed or required for equipment costs. The form is designed, however, to develop rates for each franchise within an operator's system. We clarify that the allocation of equipment costs to the franchise level may reflect averaging to the extent permitted by the cost accounting and allocation provisions of Section 76.924 of our rules."[96]

66. While not raised specifically in the petitions, several other matters need to be explained or clarified. Lost converters should not require separate consideration in the calculation of equipment rates inasmuch as the depreciation rates may take into account a normal loss, and retirement of such lost items will adjust the net plant balance. To the extent that there is an unusual number of lost items which is not provided for in depreciation rates, a reasonable adjustment may be made to

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[95] Specifically, under Section 76.923 of our rules, operators are required to separate charges for each significantly different type of remote, converter box and installation. An operator may establish one charge for all other customer equipment or develop independent charges for specified other equipment. See Rate Order at para. 288.

[96] In Section 76.924(d) of our rules, we stated that "cable operators shall aggregate expenses and revenues at either the franchise, system, regional, or company level in a manner consistent with practices of the operator as of April 3, 1992." We clarify here that this rule also applies to equipment and installation costs.

recover the cost.[97] Likewise, unusual maintenance may not be adequately provided for. For instance, where a company sends one equipment type out for repair instead of doing the work itself, such amount will be averaged over all equipment types if the expense is included on Schedule B. To remedy this, the expense should be included on Schedule C, Column H with notation and documentation. This will ensure that the cost is averaged over the specific equipment type only and not over all equipment.

67. Annual recalculations of equipment costs should be based on the annual data for the operator's previous fiscal year. When, however, there has been an unusual change in operations that would not be adequately reflected in the previous year's annual data, subject to acceptance by the local franchising authority, or by the FCC when applicable, a representative month may be used for the calculation of rates. Further, when there would be no material difference in results from using a representative month rather than the past fiscal year, and where the local franchise authority, or the FCC when applicable, finds it acceptable, a representative month may be used. In both cases, the operator should attach a brief statement to Form 393 explaining why it is appropriate to use a representative month.

68. The equipment calculations provide that the cost of maintaining equipment is to be included in the charge made for the equipment. Accordingly, there should not also be a separate charge made to customers for service calls to maintain company owned equipment on customers' premises.

69. The charge for service installation is to be calculated on the basis of the hourly service charge (HSC). This charge includes the direct labor as well as the capital costs of the service installations as determined on Schedule A of Form 393, Part III. Consistent with our determination to unbundle installation and equipment charges in the Rate Order, it does not include the cost of material for the drop, connections, inside wire, or other equipment installed.[98] These items are either

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[97] Local franchising authorities should be able to assess the reasonableness of such adjustments. Where recovery over the next year will not cause unusual rate spikes, an adjustment can be made by including such unusual losses in the depreciation expense reported on Schedule C, Column H. In such case the amount included for unusual losses should be noted and documented. Where an unusual rate spike would occur, the recovery should be made by deferring the loss for ratemaking purposes and amortising the amount over a long enough period to smooth out the rate effect, such as over the average remaining life for the equipment in question.

[98] Rate Order, at para. 288.

capitalized as distribution plant or separately chargeable to customers in equipment prices. The installation labor may include all labor from the drop inward, including the cost of labor to install the drop and connections.[99] Since the cost of the drop material is capitalizable as distribution plant, the expected maintenance to the drop over its useful life shall not be included in the installation charge. Installations are not to be capitalized and are, therefore, not includable on Schedule C of Form 393, Part III. Finally, the installation charge may be a one time charge or set up in installments.[100]

F. PROCEDURAL AND JURISDICTIONAL ISSUES

1. Preemption of Franchise Agreements Barring Rate Regulation

70. The Rate Order stated that the 1992 Cable Act preempts provisions in existing franchising agreements barring rate regulation by franchising authorities.[101] It cited the House Report which stated that all franchising authorities, regardless of preexisting provisions in a franchise agreement, now have the right to regulate basic cable service rates if they meet the certification requirements.[102] In this regard, it noted that Congress would not have expressly grandfathered specific types of rate regulation agreements in Section 623(j) of the Communications Act had it intended that any other rate regulation

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[99] In the Rate Order, we stated that operators could charge for installations on the basis of the HSC times the actual person hours of the visit. This provision recognized that the cost of installations could vary depending on the length of the drop. It was noted that basing the charge on the person hours per visit would recognize the cost differential while precluding the need for surcharges. Alternatively, however, we permitted cable operators to base the installation charge on the HSC times the average hours spent per installation visit. Consistent with this alternative, it would also be acceptable to exclude labor associated with all drops from customer installation charges and to capitalize the labor as part of the cost of the drop. Rate Order at para. 298.

[100] Operators may also sell service contracts on such equipment. The price of these contracts shall be based on the HSC times the estimated average number of hours required for maintenance and repair over the expected life of the equipment. Rate Order at para. 298.

[101] Rate Order at para. 61.

[102] Rate Order at para. 60.

agreements would continue in force and effect.[103]

71. One petitioner, representing cable interests, requests that the Commission allow cable operators and franchising authorities to enter into new agreements under which local authorities would forbear regulation. This petitioner contends that such agreements serve the public interest to the extent that a franchising authority may negotiate benefits such as upgrades and expanded service areas, or where it determines that it can make better use of its franchise fees than in costly rate regulation. The petitioner proposes that such agreements may not be conditioned on some alternate form of rate regulation, and that they permit the franchising authority to seek certification if the cable operator breaches the agreement. Another group of cable operators asserts that such agreements would reduce the number of Commission cost-of-service proceedings and appeals of local cost-of-service proceedings, as well as permit negotiation for service options that may not be easily obtained without cost-of-service showings.

72. We believe that the types of arrangements described by the petitioners are not permitted under the Act. As the Conference Report stated the goal of Section 623(a) of the Communications Act "is to protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[104] It is apparent that Congress did not intend to permit local franchising authorities to bargain away this statutory protection for local subscribers in exchange for some other related or wholly unrelated benefit, whether perceived or actual.[105] Under the current regulatory scheme, a franchising authority that does not believe rate regulation is necessary may simply choose not to seek certification from the Commission. The franchising authority may conclude, for instance, that the cable operator's basic rate is reasonable and its service satisfactory, or the franchise fee may be earmarked for other governmental purposes. As stated in the Rate Order, the Commission will not assume jurisdiction at this time where a franchising authority does not apply for

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[103] Id. at para. 61.

[104] Conference Report at 62.

[105] An agreement to regulate rates in a manner inconsistent with Commission rules is, in any event, squarely prohibited by Section 623(a)(3)(A) of the Communications Act. See also Rate Order at para. 471. Similarly, neither cable operators nor franchising authorities are permitted to reach "off the books" agreements that affect, or are inconsistent with, local or federal obligations under the Cable Act.

certification.[106] Such a decision by the franchising authority, however, does not and cannot preclude it from seeking certification in the future if circumstances warrant local rate regulation.

2. Cable Operator Responses to Cable Programming Services Complaints

73. Section 623(c)(1)(B) of the Communications Act requires the Commission to establish "fair and expeditious procedures for the receipt, consideration and resolution of complaints" regarding cable programming services. Section 623(c)(3) provides that, with the exception of complaints filed during the 180-day period following the effective date of our rules, cable programming service complaints must be filed within "a reasonable period of time" following a change in rates, including a change in rates resulting from a tiering change. The Rate Order interpreted "reasonable period of time" as 45 days from the time a subscriber receives a bill from the cable operator that reflects the rate increase.[107] The Rate Order also determined that the complainant must supply certain readily available factual information to make a "minimum showing," on a standard complaint form, to receive adjudication of the complaint.[108] Complaints that fail initially to meet the minimum showing requirement will be dismissed without prejudice and the complainant will be given one additional opportunity to file a corrected complaint.[109] Absent a Commission notification that the complaint fails to make the minimum showing, the cable operator must respond within 30 days from the date of service.[110] A cable operator failing to file and serve a response to a valid complaint may be deemed in default, and an order may be entered against the cable operator finding the rate in question to be unreasonable and mandating appropriate relief.[111]

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[106] Rate Order at para. 54; see also id. at para. 53 n.166. A franchising authority, however, may request the Commission to regulate basic service rates in its community if it is unable to do so under the statute and our rules. Rate Order at para. 55.

[107] Rate Order at para. 333.

[108] Id. at paras. 339, 340. The complainant must allege simply that a rate for cable programming service or associated equipment charged by the cable operator is unreasonable because it violates the Commission's rate regulations.

[109] Id.

[110] Id. at para. 356.

[111] Id.

74. Certain cable operators argue that the Commission should first determine whether a complaint is meritorious before the operator is obligated to respond. Petitioners contend that the burden should not be placed on the cable operator to respond in 30 days if the Commission is unable to dismiss frivolous complaints within that time period. They argue that if the Commission does not first determine that a complaint fails to meet the minimal requirements, then the cable operator should be able to respond simply that the complaint is deficient and not be required to justify its rates.

75. We believe that cable programming service complaint procedures adopted in the Rate Order effectively implement the statutory mandate. With respect to patently defective complaints, Commission processing should eliminate such complaints within 30 days, prior to an operator's response.[112] If petitioners mean to implicate complaints that are not patently defective, they would seem to transform the subscriber's "minimum showing" requirement into a *prima facie* showing requirement, which would be in direct contradiction to the purpose of Section 623.[113] Petitioners' proposal would also delay Commission consideration of the subscriber's complaint, because the subscriber and the Commission would ultimately wait longer for the cable operator's substantive response before the rates could be considered. As a practical matter, the cable operator, not the subscriber, is privy to the information that will support its rates. Moreover, most cable operators can be expected to have already performed a benchmark calculation to some level of precision in setting their rates. The 30-day time period for cable operator responses to a cable programming services complaint (unless dismissal occurs during that period) thus sufficiently addresses the Commission's ability to review the complaints in a complete and timely fashion, while preserving congressional intent to place a minimal burden on subscribers.

3. Refund Liability Pursuant to Unsuccessful Effective Competition Challenge

76. The Rate Order stated that a cable operator may file a petition for reconsideration of the franchising authority's

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[112] A "patently defective" complaint is one which omits answers called for in the standard complaint form. Such defective complaints will be dismissed without prejudice, with an opportunity for correction within 30 days of notification. The Commission can make this determination even before reaching the merits as to whether the complaint makes the "minimum showing" described in the Rate Order at para. 341.

[113] See Rate Order at para. 339.

certification within 30 days after the certification is granted.[114] It also stated that if the petition for reconsideration challenges the presumption that effective competition is absent, rate regulation will be automatically stayed until resolution of the petition.[115] If the petition is resolved in the franchising authority's favor, *i.e.*, no effective competition is found, the cable operator would be subject to refund liability back to the date the petition was filed.[116] The Commission adopted this procedure to protect the rights of cable operators to be free of rate regulation in the event effective competition does exist, while ensuring that subscribers receive compensation for any overages charged during the pendency of an ultimately unsuccessful petition.[117]

77. A number of municipalities contend that refund liability dating back only to the date of filing the petition for reconsideration, if misinterpreted, could encourage cable operators to make such filings regardless of the petition's underlying merits, because it would reduce their refund liability by at least a month, and possibly much longer. This would occur because the cable operator's refund liability goes back potentially to the effective date of the rate rules, *i. e.*, September 1, 1993, for the systems serving most subscribers. If a franchising authority were to seek certification on October 1, 1993, and the cable operator were to challenge that certification request on the basis of effective competition on October 31, 1993, the provision could be read to limit the operator's refund liability to October 31, 1993. This would remove the refund liability for a two-month period, even if the operator were to ultimately lose the effective competition challenge. Petitioners are correct in pointing out this unintended and inappropriate possibility. Therefore, cable operators filing an effective competition challenge will be subject to the same refund liability as all other systems should their challenges prove unsuccessful, and Section 76.911(c)(3) of the Commission's rules is clarified accordingly.

4. Basic Tier Definition

78. Section 3(b)(7)(A) of the 1992 Cable Act provides that the minimum contents of the basic service tier should include: all signals carried in fulfillment of the requirements of

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[114] Rate Order at para. 88.

[115] Id. at paras. 46, 89.

[116] Id. at para. 89; 47 C.F.R. § 76.911(c)(3).

[117] Id. at para. 89.

Sections 614 and 615[118] of the Communications Act; any public, educational, or government access channels required by the franchise; and any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station. The Rate Order stated that this statutory definition of the basic service tier preempted provisions in franchise agreements that require additional services to be carried on the basic tier.[119]

79. A number of municipalities argue that this interpretation is inconsistent with preexisting sections of the Communications Act, added by the 1984 Cable Act, that have not been superseded by the 1992 Cable Act, such as Section 625(a)(1)(B), relating to the modification of existing franchise obligations. Petitioners argue that because this provision permits a franchising authority to prohibit a cable operator from changing the "mix, quality or level" of cable services required in a franchise unless the cable operator demonstrates that such "mix, quality or level" of services remains the same after any modification, a franchising authority could prohibit the retiering of programming from basic to another tier.

80. Petitioners also argue that because Section 624(b)(2)(B) of the Communications Act allows franchising authorities to enforce requirements "for broad categories of video programming or other services," Congress did not intend to preempt preexisting franchise agreements. In any event, they contend, requirements in an existing agreement are those to which the franchising authority and the cable operator have already agreed, and were not imposed unilaterally by the franchising authority.

81. One petitioner argues that the 1992 Cable Act amended the 1984 Cable Act specifically to permit franchising authorities to take into account the number of channels on a tier in deciding whether to renew a franchise. The petitioner points out that, in the 1992 Cable Act, Congress specifically omitted the 1984 Act's prohibition against taking into account the "level" of services for renewal purposes, so that, it argues, franchising authorities now can require a certain level of services, *i.e.*, specify the

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[118] Sections 4 and 5 of the Cable Act contain the must-carry requirements pertaining to commercial and noncommercial television stations, respectively.

[119] Rate Order at para. 161.

number of channels on the basic tier, in renewal negotiations.[120]

82. Petitioners also argue that because Section 625(d) allows cable operators to rearrange service from one tier to another if rates for these tiers are not subject to regulation, the above reasoning is logical only with respect to cable operators not subject to rate regulation. They argue that this provision would be unnecessary if all cable operators could freely move services from one tier to another.

83. In response to these assertions, a number of cable interests argue that the elements of basic service should be at the cable operators' discretion, and not imposed as part of a franchise agreement. As one such petitioner points out, the franchising authority could require so many basic channels that they would control the rates of all satellite-delivered programming services and have the power to control retiering, which would nullify the Commission's sole jurisdiction over cable programming services in Section 623. The municipalities reply that if cable operators have the sole discretion to add satellite-delivered programming to the basic tier, this already eliminates the Commission's sole jurisdiction over those channels.

84. We reaffirm the Rate Order's preemption of franchise agreements that purport to mandate distribution of additional services on the basic tier beyond the new statutory requirement. The legislative history of the 1992 Cable Act is unequivocal that Congress intended to give cable operators the right to determine the elements of the basic tier, subject to the minimum statutory requirements.[121] We believe that this flexibility is unaffected by the franchising authority's new right to take into account the "level" of services at renewal time. Indeed, the Senate Report

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[120] Petitioner also proposes that, along with this right, would be the enforcement of "lifeline" tier requirements, i.e., sub-basic tiers designed for senior citizens and economically disadvantaged residents. The Commission has already determined, however, that Congress intended that cable operators have only one basic tier for purposes of the rate regulation provisions of the 1992 Cable Act. Rate Order at para. 170. For the same policy reasons that cable operators would not be able to offer an expanded basic tier in addition to the required basic tier, franchising authorities would not be able to enforce such "sub-basic" tier requirements. Nothing in the Commission's Rules or the 1992 Act, however, prevents an operator from offering its basic service tier to senior citizens and other economically disadvantaged groups at a discounted rate. See generally Rate Order at para. 197 n.500; Communications Act, Section 623(e)(1), 47 U.S.C. Section 543(e)(1).

[121] Rate Order at para. 161 n. 427.

indicates that Section 626 was amended to "allow the franchising authority to consider the level of service provided over the system throughout the franchise term."[122] Thus, it appears that the franchising authority's right to consider the "level" of services does not relate only to the basic tier, or to specific channels, but to the system capacity as a whole.

85. The fact that Congress left Section 625 unchanged suggests that a franchising authority may deny a modification request, based on the franchising authority's determination that the cable operator has changed the "mix, quality and level" of services required by the franchise. But this determination must similarly relate to the system as a whole, not just to the specific composition of the basic tier. Thus, the municipalities have not presented any persuasive arguments that Congress intended to grant them discretion over the basic tier composition.

86. The affirmative authorization in Section 625(d) of the Communications Act for system operators to switch services among unregulated service tiers, although of less import following adoption of the 1992 Act, is not inconsistent with the view expressed in the Rate Order and in the Conference Report that, in the regulated environment, the basic tier is to be composed of the broadcast and access channels specified in the statute and such other services "that the cable operator may choose to provide."[123] While we are bound to take into account the comprehensive statutory scheme, to harmonize, if possible, seemingly contradictory provisions,[124] and to construe the statute in a manner that does not render certain provisions superfluous[125], we must also accord substantial weight to recently-enacted amendments and their legislative history.[126] In this case, that history evinces Congress' intention to displace

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[122] Senate Report at 82 (emphasis supplied).

[123] Conference Report at 60.

[124] Citizens to Save Spencer County v. EPA, 600 F.2d 844, 871-72 (D.C. Cir. 1979) (agency may devise middle course to give maximum effect to both provisions).

[125] U.S. v. Nordic Village, Inc., 112 S.Ct. 1011 (1992).

[126] See May Department Stores Co. v. Smith, 572 F.2d 1275, 1278 (8th Cir. 1978), cert. denied, 439 U.S. 837 (1978) (subsequent amendment and its legislative history entitled to substantial weight in construing earlier law). See also Sutherland Statutory Construction § 22.34 (4th ed.) (where amended and original sections of a statute cannot be harmonized, the new provisions should prevail as the latest declaration of legislative will).

the franchising authority's discretion over the composition of the basic tier. Allowing franchising authorities to continue to enforce service requirements for the basic tier that are well beyond the statutory requirements would clearly compromise Congress's principal concern in enacting the 1992 Cable Act that cable operators provide local services on a basic tier at reasonable rates. Thus, we affirm our prior conclusion that franchising authorities do not have the authority under the Act to require carriage on the basic tier of channels other than those set forth in the statute.[127]

G. THE PRICE CAP GOVERNING CABLE SERVICE RATES

87. In the Rate Order, we determined that rates for regulated cable service would be governed by a price cap mechanism once initial regulated rates were determined either through the benchmark or cost-of-service approaches.[128] Capped rates may be adjusted annually for inflation. In addition, cable operators may pass through to subscribers increases in certain categories of external costs to the extent that such increases exceed inflation: costs of retransmission consent fees incurred after October 6, 1994, other programming cost increases, taxes, and the costs of franchise requirements including PEG access channels. Franchise fees are also accorded external cost treatment.[129] A number of petitioners and responding commenters

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[127] We similarly affirm that franchising authorities may not regulate tier restructuring in a manner that is inconsistent with the 1992 Cable Act. See Communications Act, Sections 623(a)(1), (f), 47 U.S.C. Sections 543(a)(1), (f). In particular, local authorities are precluded from regulating negative option billing to prevent tier restructuring regardless of how the local requirement is characterized. The Commission has ruled that cable operators may engage in revenue-neutral tier restructuring without violating the negative option billing procedure. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Order, FCC 93-176, 8 FCC Rcd 2921 (1993), clarified 8 FCC Rcd 2917 (1993).

[128] The Commission selected an annual adjustment measured by the GNP-PI. Rate Order, at para. 223.

[129] See generally 47 C.F.R. §76.922(d)(2)(i) (1993). However, we recognized that the survey data on which the benchmark is based includes all external costs other than franchise fees. We determined that permitting external treatment for the full amount of increases in these costs on top of the automatic inflation adjustment would permit double recovery of those costs that are equal to or less than inflation. Thus, we concluded that for all categories of external costs, other than franchise fees, we will

have expressed concerns about, and/or suggested modifications to, various features of our price cap requirements. We address these concerns and proposals in turn.

1. External Costs

88. General Issues. Several petitioners urge the Commission to adopt suggested overarching criteria for determining eligible categories of external costs. They contend, for example, that operators have substantial bargaining control over programming costs, franchise fees, and other franchise requirements, and that only costs that are beyond the control of the cable operator should be subject to external treatment.[130] Several telephone companies contend that telephone companies subject to price cap requirements can only pass through costs triggered by administrative, legislative, or judicial action beyond the control of the carriers,[131] and that we should limit pass through of external costs to the same extent that we permit telephone companies to do so.[132] Telephone companies also urge that we incorporate a sharing feature in the price cap mechanism for cable service similar to the one that we have included in the price cap rules for telephone carriers.[133] NATOA argues that external treatment should only be accorded to franchise fees because the Commission's benchmark formula generally reflects all costs other than franchise fees and that allowing external treatment for other costs would permit operators to recover such

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permit external treatment for increases in such costs only to the extent they exceed inflation as measured by the GNP-PI. Rate Order, at para. 257.

[130] King County Petition at 4. The petitioner observes that some franchise requirements, such as local programming requirements, may enhance the operator's marketability and subscribership, thereby increasing revenues. Thus, such a requirement may not justify permitting the operator a rate increase. Id.

[131] Bell Atlantic Petition at 5, citing, Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6807 (1990).

[132] Bell Atlantic Petition at 4-6; BellSouth Petition at 2. They urge that if we do not make external cost treatment for cable companies the same as exogenous cost treatment for telephone companies subject to price cap requirements, then we should amend telephone company price cap requirements to make them comparable to those for cable operators.

[133] Bell Atlantic Petition at 3-4.

costs twice.[134]

89. As indicated, our price cap governing cable service rates accords external cost treatment to costs of retransmission consent fees incurred after October 6, 1994, other programming cost increases, franchise fees, taxes, and the costs of franchise requirements including PEG access channels. We adopted each category of external costs based on the considerations pertaining to the category as discussed in the Rate Order. As modified and clarified below, we believe that these external costs, will permit an initial implementation of cable service rate regulation that will achieve the goals for that regulation expressed in the Rate Order. These categories of costs will broaden cable operators' opportunities to recover the actual changes in such costs, instead of relying on a general inflation adjustment, while at the same time not being so extensive as to undermine the benefits of a price cap mechanism as the primary method of regulation of cable service rates. We will also monitor the impact of these categories of external costs and will modify and refine them as necessary to assure that, as a whole, they will achieve our goals for rate regulation of cable service. For these reasons, we do not find it necessary to adopt the more restrictive overarching standards for determination of external costs sought by some petitioners.

90. More particularly, we do not believe that the cable operators' control over the costs in question should be the exclusive criterion for selection of external costs.[135] Thus, as discussed in the Rate Order, other objectives such as assuring the continued growth of programming diversity may dictate different criteria.[136] Telephone companies have failed to advance a sufficient reason why we should adopt as an overriding policy goal achieving parity in price cap mechanisms for the two industries.[137] Instead, our price cap requirements for cable and telephone services are, and should be, based on the respective, separate considerations discussed in the proceedings in which we adopted those respective requirements. In addition, under the price cap mechanism changes in external costs are compared to inflation. Increases in external costs more than inflation will be reflected in rate increases, and decreases in such costs and

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[134] NATOA Opposition at 12.

[135] Although it can be a factor. See para. 98-102, supra.

[136] Rate Order, para. 251.

[137] It should be noted that the Communications Act continues to state that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service." 47 U.S.C. Section 541(c).

increases less than inflation will be reflected in rate reductions. Thus, contrary to NATOA's assertions, there is no double recovery for costs accorded external treatment. For these reasons, we will not change the scope of our external cost treatment.

91. Retransmission Consent Fees. In the Rate Order, we observed that not treating retransmission consent fees as external to the price cap may provide operators the greatest incentive to drive a hard bargain with broadcasters over the value of broadcast signals.[138] However, we recognized that such an approach could risk the non-carriage of broadcast signals if an operator and broadcaster are unable to reach a final agreement regarding a retransmission consent fees.[139] In addition, we concluded that treating retransmission consent fees as external to the price cap would provide greater assurance that broadcast signals are carried because operators could recover these costs through increased rates for cable service. The Commission thus determined that providing external treatment for increases in costs associated with retransmission consent fees best balances these competing interests.[140] However, in order to prevent any sudden increase in subscriber rates due to initial retransmission consent fees, we provided that external treatment for retransmission consent fees would commence after October 6, 1994.[141] External treatment is limited to the new or additional fees beyond those already being charged on that date.[142]

92. Cable operators agree with the Commission's decision to treat costs associated with retransmission consent fees as external to the price cap. However, they dispute the justification for delaying such treatment of retransmission

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[138] Id. at para. 245.

[139] Id.

[140] Id. at para. 246.

[141] See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues, Rate Order, 8 FCC Rcd 2965 (1993); clarified, FCC 93-284 (released May 28, 1993)("Must Carry/Retransmission Report and Order").

[142] Rate Order, at para. 247. We determined that current rates for cable service, on which the benchmark formula is based, take into account the value of broadcast signals to operators. Thus, as for other external costs except franchise fees, only increases in retransmission consent fees that exceed the price cap may be passed through to subscribers. Rate Order, at paras. 245-47.

consent fees until October 6, 1994, as described above.[143] Blade contends that although operators have long carried broadcast signals, cable service rates historically have not reflected a significant "value" for these signals.[144] If we preclude operators from recouping these costs, Blade threatens to drop a number of broadcast signals demanding retransmission consent fees.[145]

93. We are not persuaded that we should alter the starting date for external cost treatment of retransmission consent fees. As we stated in the Rate Order, delaying the external treatment of retransmission consent fees until that date will protect consumers from abrupt rate increases in response to new retransmission consent arrangements occurring on or after October 6, 1993. We believe that protecting consumers from abrupt rate increases fulfills our statutory mandate[146] and should be accorded greater weight than the fact that retransmission consent fees are new costs to cable operators. Delaying the starting date for external cost treatment for retransmission consent fees also is more likely to encourage cable operators to negotiate a fair price for retransmission consent fees. We do not believe that this will lead to significant numbers of cable operators dropping stations instead of seeking to negotiate a fair price for retransmission consent fees. In addition, as stated in the Rate Order, we believe that cable rates already reflect the value of broadcast signals offered to subscribers. Thus, to some extent, retransmission consent fees merely reflect compensation to broadcasters already received by cable operators from subscribers. Accordingly, we will not alter the starting date for external cost treatment for retransmission consent fees. As we stated in the Rate Order, we will closely monitor initial retransmission consent agreements for their potential impact upon subscriber rates. If additional measures appear necessary to

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[143] See e.g., Booth Petition at 20; Blade Petition at 8-10; NCTA Opposition at 24; Time Warner Petition at 31.

[144] Blade Petition at 9. Time Warner draws a distinction between the "cost" and the "value" of broadcast signals to cable operators. Time Warner states that under competitive conditions, as the benchmark is intended to approximate, competing operators presumably "compete away" the implicit value of broadcast signals. Thus, it argues, these newly required retransmission consent fees constitute new costs to the operator, and should be treated externally from the price cap starting on the initial date of retransmission consent agreements. Time Warner Petition at 32.

[145] Blade Petition at 9.

[146] See Communications Act, Section 623(b)(1), 47 U.S.C. Section 543(b)(1).

protect subscribers from unwarranted increases in the rates for cable service on the basic tier, we will reexamine this treatment of retransmission consent fees.[147]

94. System Upgrades. In the Rate Order, we concluded that we should not give external treatment to costs of system improvements.[148] We stated that such expenditures are likely to be significant and, if automatically passed through, could lead to substantially increased rates. We also stated that local authorities should be permitted to carefully weigh the costs and benefits of network improvements. We then held that costs of network improvements could be recovered through cost-of-service showings to the extent they cannot be recovered through rates regulated under the price cap scheme. We stated that we would monitor the effects of treating network improvement costs this way and, if it appeared that this treatment thwarts the development of new technologies and services, would review our decision as necessary.

95. Cable operators urge the Commission to accord external treatment for costs associated with upgrades and other capital improvements.[149] They state that the Commission's benchmark/price cap mechanism does not account for upgrade costs.[150] Thus, they assert, operators will be unable to recover costs of expansion of systems, except through cost of service showings, despite the Commission's stated goal to "permit the continued growth of [cable] services."[151] Comcast argues that requiring operators to recoup such costs only through cost-of-

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[147] Rate Order, at para. 247.

[148] Rate Order, at para. 256, n. 608.

[149] See e.g., Advanced Communications Petition at 4-7; NCTA Petition at 19-21; Discovery Petition at 4-5; Viacom Petition at 4-8; Blade Petition at 6-7; Colony Petition at 4-8; Comcast Petition at 3-8. See also Corning Petition at 20.

[150] Advanced Petition at 4; Viacom Petition at 9. Discovery states that the benchmark was based only on a snapshot of rates charged by systems, and did not take into account once-a-decade capital expansions. Discovery Petition at 5.

[151] Comcast Petition at 2, citing Rate Order, at para. 9. Comcast observes that cable television has undergone tremendous growth since the 1984 Act, but argues that the current benchmark/price cap mechanism, as described in the Rate Order, will stifle continued expansion. Comcast Petition at 5-6. Corning states that future investments in system expansions are necessary to achieve increased diversity and quality of programming. Corning Petition at 20.

service showings is an untenable option, such that operators may choose not to undertake upgrade expansions at all.[152] These parties suggest that we permit upgrade costs to be treated externally, subject to evaluation by the local authorities.[153]

96. Other petitioners support the current treatment of cable system upgrade costs, as described in the Rate Order.[154] These petitioners argue that cable operators should not be permitted to recover these costs externally from the benchmark/price cap mechanism because upgrade costs are reflected in the survey data on which the benchmark formula is based. In particular, they note that systems which upgraded their plant and operations prior to September 30, 1992 were sampled in the survey and the rates resulting from such upgrades are represented in our benchmark approach. Thus, these commenters claim, permitting external treatment for such costs would result in operators' double-recovery of upgrade costs.[155] They also contend that these costs are within the control of operators because, unless required by regulators or authorities, the final decision whether

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[152] Advanced Petition at 4; Viacom Petition at 9.

[153] Comcast Petition at 10-11. See also Corning Petition at 20. Comcast proposes requiring operators to notify franchising authorities at least 60 days before any pass-throughs of costs for system expansions are charged to subscribers, and to provide the authorities with cost justification for these additional charges. Comcast then suggests various time periods during which the authority would have to review the operator's showing, and for the parties to negotiate. Comcast Petition at 10-11. NATOA agrees that, if such costs are accorded external treatment, local authorities should be permitted to review plans for system expansions. However, NATOA suggests that conflicts between operators and local authorities may arise over whether lesser system improvements qualify as an "upgrade" for purposes of external treatment of their costs. NATOA Petition at 13. Viacom, however, believes that operators must be completely free to expand programming offerings through system expansions as they see fit, without review by local authorities. Viacom opposes permitting local franchising authorities to pass on operators' upgrade plans because such review is not provided to local authorities within the 1992 Cable Act. Viacom Petition at 7-9.

[154] See e.g. NATOA Opposition at 12-13; GTE Opposition at 12-15; BellSouth Petition at 3-8.

[155] NATOA Opposition at 12.

to expand the system naturally rests with the cable operator.[156] NATOA argues that permitting external treatment for upgrade costs may not be in the public interest because only a few subscribers may receive the benefits related to a system expansion whose costs will be subsidized by all subscribers.[157] GTE argues that if the substantial costs associated with system expansions are permitted to be passed-through directly to subscribers, cable systems will have no incentive to make only prudent investments in plant and equipment.[158] BellSouth is concerned primarily that permitting operators to pass-through upgrade costs will allow them to recoup the costs of establishing new non-regulated services, such as two-way communications services, within the rates for regulated services.[159]

97. As stated in the Rate Order, upgrade costs can be significant and could substantially affect cable rates. After reviewing the petitions for reconsideration, we continue to believe that such costs should be evaluated using cost-of-service principles, and should not simply be passed through to subscribers where local franchise authorities have the opportunity for only a cursory review.[160] System upgrades will normally involve capital expenditures that will be recovered over a number of years. A determination of the appropriate recovery of such costs, including a fair rate of return and the proper allocation of costs to regulated and unregulated services, necessarily involves cost-of-service issues. Accordingly, we believe that establishment of any external treatment for upgrade expenditures should await adoption of cost-of-service standards that can then govern any external treatment of such costs. In

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[156] NATOA argues further that operators should not receive favorable treatment regarding upgrade costs just because their voluntary decision to expand the system is reduced to a binding covenant within a franchise agreement. NATOA Petition at 13. See also GTE Opposition at 14.

[157] NATOA Petition at 13.

[158] GTE Opposition at 14-15.

[159] BellSouth Opposition at 5-6.

[160] We note, however, that passing-through upgrade costs may well be appropriate where such upgrades are required under the franchise. Local authorities presumably are in a position to weigh the potential impact of any cost increases on subscribers at the time they require system changes. See e.g., Communications Act, Section 623(b)(4), 47 U.S.C. Section 543(b)(4). We thus seek comment on whether operators should be permitted to pass through as external costs upgrades required by local franchise authorities. See paras. 153-154, supra.

the Cost-of-Service Proceeding we are also examining streamlined treatment of upgrade costs. If adopted, this could provide a treatment of upgrade expenditures substantially similar to external treatment. We therefore will address in that proceeding whether and how we might establish external treatment for upgrade expenditures. Also, if the upgrade involves a change in the number of channels offered, we are continuing to examine methodologies to take into account the increased costs.[161] In the interim, operators seeking to recover such costs may do so through a cost-of-service showing.

98. Costs of Franchise Requirements. The Cable Act of 1992 requires that in setting basic service rates, we take into account the reasonably and properly allocable portion of, inter alia: the cost of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise, and the costs of any public, educational, and governmental access programming required by the franchising authority. The regulatory framework for regulation of cable service adopted in the Rate Order took these costs into account in part by providing that the costs of satisfying franchise requirements, including the costs of satisfying franchise requirements for local, public, educational, and governmental access channels, would be accorded external cost treatment.[162] We stated that these costs are largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing.[163]

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[161] See paras. 133-144, infra.

[162] The Cable Act of 1992 requires that our rate regulations for the basic service tier include standards to identify costs that are attributable to satisfying franchise requirements to support public, educational and governmental channels, to the use of such channels or to any other services required under franchise. Communications Act § 623(b)(4), 47 U.S.C. § 543(b)(4). In the Rate Order, we determined that the costs attributable to satisfying franchise requirements shall include:

> 1) the sum of per channel costs for the number of channels used to meet franchise requirements for public, educational, and governmental channels; 2) any direct costs of providing any other services required under the franchise; and 3) a reasonable allocation of overhead.

[163] The accounting and cost allocation rules adopted in the Rate Order require that costs associated with PEG channels carried on the basic tier be directly assigned to the basic tier where possible, and that remaining costs of taxes and costs of satisfying franchise requirements be allocated between or among tiers in

99. On reconsideration, municipalities generally urge the Commission to define narrowly the scope of costs of franchise requirements that cable systems will be permitted to pass-through directly to subscribers as external costs.[164] King County contends that franchise-related costs are not beyond the control of operators in that cable systems bargain actively with authorities over long periods of time over these requirements. Michigan Communities warns the Commission that operators will attempt to turn the Commission's price cap into a "price floor" by characterizing most major franchise-related costs as external costs.[165] It is concerned that operators will attempt to force authorities to permit operators to characterize anything in a new franchise agreement as a franchise requirement entitled to pass-through treatment.[166] It states that operators will seek external cost treatment for all new standards required of operators by law, including customer service standards, technical standards, SEC requirements, local zoning laws, social security payments, and any other legal requirement tightened since the last franchise agreement.[167] NATOA urges the Commission to define the term "costs of franchise requirements" to include only direct and verifiable monetary costs specifically enumerated by a dollar amount in a franchise agreement to satisfy franchise requirements imposed by the authority.[168] In addition, NATOA believes that the Commission should not accord external treatment to franchise-related costs that operators currently provide on a voluntary basis such as customer service-related costs that many operators incur in voluntarily complying with minimum service standards adopted by NCTA.[169] NATOA also argues generally that it is unfair

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proportion to the number of channels on each tier.

[164] See e.g., Michigan Communities Opposition at 14-18; NATOA Petition at 4-9; King County Petition at 3-9.

[165] Michigan Communities Opposition at 14.

[166] Michigan Communities Opposition at 16. Petitioner states that operators have told its member communities that any new customer standards described in a franchise agreement, even those just codifying the operator's current customer service practices, must be treated as a franchise requirement. Id.

[167] Michigan Communities Opposition at 16.

[168] NATOA Petition at 4. In addition, NATOA argues that, in order to prevent operators from overestimating their costs, operators should be required to spread the costs of satisfying franchise requirements over the franchise term. Id. at 4-5.

[169] NATOA Petition at 5-6.

to allow operators to pass-through costs they may currently incur, such as costs incurred to comply with the Commission's recently adopted customer service standards.[170]

100. Cable operators, on the other hand, generally argue that external treatment of franchise-related costs appropriately allows them to recover the costs of items required by local authorities in exchange for franchises, and that such costs are largely under the control of local authorities.[171] NCTA contends that there is no justifiable distinction between franchise-related costs specifically enumerated by a dollar amount within a franchise agreement and those requiring in-kind expenditures. NCTA states that NATOA misunderstands current Commission rules, which permit the pass-through only of increases in external costs that exceed the GNP-PI.[172] Continental asserts that certain costs, particularly PEG access channels and institutional networks, should be treated externally from the price cap because these are clearly traditional franchise requirements.[173] Continental further objects to permitting local authorities to exclude overhead for PEG access channels and requiring operators to spread franchise-related costs over the franchise agreement term. Continental notes that it has expended tremendous funds for customer service; thus, it believes that it should be permitted to recover at least increases in these costs due to new government standards, as permitted under the Commission's current rules.[174]

101. We believe that the scope of costs that are eligible for external treatment as costs of satisfying franchise requirements should be guided by the statutory language indicating that our regulatory framework for the basic service

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[170] NATOA Petition at 5. See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Rate Order, MM Docket No. 92-263 (1993).

[171] See generally NCTA Opposition at 6-9; TKR Petition at 1-7; Cablevision Opposition at 3-5; Continental Petition at 9-14.

[172] NCTA Opposition at 8-9.

[173] Continental Petition at 11. In addition, Continental accuses municipalities of imposing unreasonable requirements in some instances, such as reimbursement of consulting fees, "renewal application fees," demand for multiple access channels, access studios, training and personnel, restoring St. Paul, Minnesota's Union Depot and other sites for redevelopment purposes, institutional networks, and emergency alert systems. Continental Petition at 10.

[174] Continental Opposition at 14-15.

tier should take such factors into account.[175] Thus, such costs include the costs of satisfying franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise, and the costs of any public, educational, and governmental access programming required by the franchising authority.

102. This statutory language should be interpreted in a way that will produce equitable results for operators and subscribers. We believe that this objective will be met by providing that only increases in the costs of complying with services specifically required in the franchise documents will be eligible for external treatment. This will permit local authorities and individual systems to work cooperatively to establish the costs of meeting franchise requirements that will be accorded external treatment. If specifically required by franchising authorities, however, we believe that costs of meeting such requirements should be accorded external treatment. This will include meeting technical and customer service standard requirements that exceed the federal standards and potentially upgrade requirements.[176] The costs of simply complying with federal customer service and technical standards, however, will not be treated as external costs. We believe that this approach will be fair to operators by assuring that they can recover costs of meeting local requirements.

103. Taxes. The Cable Act of 1992 requires the Commission in establishing regulations governing rates for the basic service tier to take into account, inter alia, the reasonably and properly allocable portion of taxes and fees imposed by any state or local authority on transactions between cable operators and subscribers, and assessments of general applicability imposed by a governmental entity applied against cable operators or cable subscribers.[177] In the Rate Order, we determined that we met the statutory directive to take general assessments into account by providing for a general inflation

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[175] In order to assure that our regulations will generally produce tier neutral results, we determine that this language will also guide any franchise requirements for cable programming services tiers.

[176] As noted previously, we believe it may be appropriate to accord external treatment to upgrade costs required by a franchise agreement. See n. 160, supra. We are seeking further comment below on this possible approach. See paras. 153-154.

[177] See Communications Act, Section 623 (b)(2)(C)(v), 47 U.S.C. § 543 (b)(2)(C)(v). As explained in the Rate Order, we determined that we should establish the same rate regulation requirements for the basic and cable programming services tiers.

adjustment to capped rates that could be expected to recover increases in such costs.[178] We met the statutory directive to take into account taxes imposed directly on the provision of cable television service by providing for external treatment of these taxes under our benchmark/price cap requirements.[179] Thus, our rules provide that increases in state and local taxes applicable to the provision of cable television service are external costs and may be passed-through to subscribers without a cost-of-service showing.[180]

104. On reconsideration, several petitioners request that we afford external treatment to certain California taxes that are imposed on cable operators in that state. Specifically, these parties ask that the California possessory interest tax be treated as an external cost for purposes of the initial rate benchmarks and future rate increases.[181] They argue that while this levy is not an industry-specific tax, it is nevertheless assessed in a unique manner against cable operators that warrants external cost treatment under Section 76.922 (d)(2)(i)(A) of our rules.[182] In this regard, they describe the tax as being

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[178] Rate Order, at para. 254.

[179] Rate Order, at para. 254.

[180] See 47 C.F.R. § 76.922 (d)(2)(i)(A). The opportunity to base rates on a cost-of-service showing also takes these costs into account independent of our price cap and external cost provisions. We note also that in the cost-of-service Notice, we proposed to allow, in determining a cable operator's annual expenses, "taxes incurred in the provision of regulated cable services." See Notice of Proposed Rulemaking, in MM Docket No. 93-215, FCC 93-353, released July 16, 1993.

[181] See California Cable Television Association (CCTA) Petition at 3-5; Colony Communications Petition at 12-13; Intermedia Partners Petition at 3-5; Continental Cablevision Petition at 10-12; Booth American Petition at 20. Petitioners also seek to have these taxes itemized on subscriber bills. We will address this itemization issue in the next reconsideration order.

[182] CCTA also requests external cost treatment for possessory interest and utility user taxes with respect to the initial benchmark rates. We note that the Rate Order only provided for external cost recovery of increases in taxes on a going forward basis. This is because the existing level of taxes is already accounted for in the benchmark, which is based on rates charged by systems in an unregulated marketplace. If these taxes place a disproportionate burden on California cable systems with respect to the initial benchmark rates, operators can make the appropriate

different from a generally applicable property tax that would be accounted for in the GNP-PI adjustment.[183] Furthermore, they explain that it is a significant tax outside the control of cable operators.[184] One petitioner also requests similar external treatment for the California utility user tax.[185] The utility user tax is described as a local tax on customers of California utilities and cable television service.[186]

105. Our rule concerning external treatment of taxes is formulated to encompass only taxes imposed by state or local authorities on transactions between cable operators and cable subscribers; taxes of general applicability applied against cable operators and subscribers are to be recovered through the inflation adjustment to capped rates. This approach is narrowly tailored to protect consumers while assuring that cable operators may recover special taxes applicable to the provision of cable television service.

106. Based on the record before us we are unable to conclude that the California possessory interest tax is, in every instance, the type of tax that is entitled to be passed through to subscribers separately and specifically, rather than accounted for and recovered as part of the GNP-PI inflation adjustment. However, we do not disagree with petitioners that such taxes may be entitled to external treatment on a going forward basis where

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cost-of-service showing to obtain individual consideration of these taxes.

[183] CCTA assumes that Section 76.9229 (d)(2)(i) was meant to subsume within the category of allowable external costs both types of taxes referenced by the 1992 Cable Act, that is, both those imposed on "transactions between cable operators and cable subscribers" and those of general applicability but "applied against cable operators or cable subscribers." CCTA Petition at 3-4.

[184] See, e.g., CCTA Petition at 5-8.

[185] See CCTA Petition at 3.

[186] CCTA indicates that this local tax is calculated as a percentage of a subscriber's monthly bill charges, which ranges from three to eleven percent, depending on the jurisdiction. CCTA states that this tax is applied to cable television customers in almost 50 California franchises, but admits that it is also applied to users of gas, electric, water and telephone services. CCTA claims, however, that it is a tax "imposed on" or "applicable to" the "provision of cable television service," since like franchise fees, it is based on customer revenues for the receipt of service. See CCTA Petition at 5.

they are in fact, as CCTA suggests, "in essence and effect" taxes on "transactions between cable operators and cable subscribers." Whether or not they are entitled to this treatment is dependent on the manner of assessment.

107. As CCTA indicates, the proper assessment technique has been the subject of ongoing litigation in California and it appears that different jurisdictions within the state have chosen to apply the tax in different ways so that in some situations the levy may be applied in a common fashion to cable and other businesses whereas in other situations cable may be subject to a relatively unique assessment process. As CCTA's own data indicate, for some systems the levy is nominal in amount and in others it is much more significant. Where the assessment is very directly related to subscriber revenues, such as where the tax is based on a value of intangible assets formula effectively calculated from the operator's income for the provision of cable service, then such a tax should, we believe, be treatable as a cost subject to "external treatment" on a going forward basis. Where this is not done and the assessment process is not different for cable and other business, we would expect this tax to be one of the costs to be accounted for under the inflation adjustment process. This result is, we believe, consistent with the statutory provisions mandating that our regulations take into account taxes imposed on system operators. Such taxes are clearly beyond the control of the system operator and this process should both avoid unnecessary cost of service showings and create a measure of accountability for the costs imposed.[187]

108. Limitations on External Treatment of Costs of Affiliated Programming. In the Rate Order, we indicated that the pass-through of increases to the program services of affiliated programmers is limited to the lesser of the annual incremental percentage increase in such costs or the GNP-PI. We defined affiliated programmers in the same manner as they are defined for purposes of the program access rules.[188] We indicated that we

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[187] Utility taxes in California and in other states do not appear to create this unique problem. We would, however, be prepared upon an appropriate demonstration to accord them external treatment as well where their application to cable can be demonstrated to be consistent with the underlying policy of the rules. We are not, however, prepared in this proceeding to rule on the California or other utility taxes specifically.

[188] See Rate Order, at para. 252 n. 601. Specifically, we determined that an affiliated programmer is a programmer with an ownership interest of 5 percent or more in a cable operator including general partnership interests, limited partnership interests, direct ownership interests and stock interests in a corporation where such stockholders are officers or directors who

took this approach with respect to affiliated programming out of concern about the abuses that might occur if we were to permit vertically integrated cable operators to engage in unlimited pass-throughs of programming costs to their subscribers.[189]

109. Subsequently, in the Cost-of-Service NPRM, we offered for comment a proposal to replace the cap on affiliated programming increases with affiliate transaction safeguards that would prevent cable MSOs from imposing unreasonable programming costs on regulated cable subscribers.[190] As a possible safeguard, we proposed to prescribe the methodology for determining the value of such costs that could be recovered in regulated cable service rates. In particular, we asked whether we should require cable operators to record affiliate transactions at prevailing company prices offered in the marketplace to third parties, whenever the supplying affiliate has established such prices, or at fair market value.[191]

110. Cable operators and programmers contend that the cap of affiliated programming increases will adversely effect the cable programming marketplace. They argue that cable systems will not want to absorb affiliated program increases and will therefore either drop such services or will offer them a la carte. In either case, they claim that subscriber programming choice will suffer.[192] Affected affiliated programmers, they

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directly or indirectly own 5 percent or more of the outstanding stock, whether voting or nonvoting. See also First Rate Order, in MM Docket No. 93-265, 8 FCC Rcd 3359, 3370 (1993).

[189] Rate Order, at para. 252.

[190] See Notice of Proposed Rulemaking in MM Docket No. 93-215, FCC 93-353, released July 16, 1993, 58 F.R. 40761 (July 30, 1993) ("Cost-of-Service NPRM"). The proposed affiliate transaction rules would encompass all affiliate transactions between the regulated and nonregulated portions of cable systems, as well as transactions that occur between regulated and nonregulated portions of the same cable company (e.g., intracompany transfers). Id. at para. 67 and n. 67.

[191] Id. at paras. 67-69. We note that initial comments were due August 25, 1993 and reply comments are due September 14, 1993 in response to the cost-of-service Notice.

[192] See, e.g., Affiliated Regional Communications, Inc. petition at 12-13 (hereinafter "ARC Petition"); Black Entertainment Television petition at 3-4 National Cable Satellite Corporation petition at 2-4 (hereinafter "NCSC Petition"); Cablevision Systems Corporation petition at 18-20 Turner Broadcasting System, Inc. petition at 3-5.

point out, would include entities that provide regional sports programming, minority entertainment programming and non-profit, public affairs programming (i.e., C-SPAN).[193] They also believe the restriction will hurt the ability of affiliated programmers to compete with nonaffiliated program services and will discourage investment in the development of new, high quality program services.[194] They further assert that many innovative program services exist today because cable MSOs were willing to invest in their services at critical stages of development.[195]

111. Petitioners also challenge the need for such a restriction and argue there is no evidence in the record to support adoption of such a rule.[196] They regard the Commission's cost-shifting concerns as theoretical. In practice, under the new regulatory regime, they believe cable MSOs will be more concerned with increasing subscribership than with obtaining any marginal benefit from unreasonable cost-shifting.[197] Some

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[193] See ARC Petition at 11-12 (regional sports network); BET Petition at 9-11 (minority entertainment programming); NCSC Petition at 2-4 (non-profit, public affairs programming). If a cap on affiliated programming is retained, both BET and NCSC request that the Commission exempt program services with their particular characteristics (i.e., minority and non-profit, non-stock program services) from the restriction. Id.

[194] See, e.g.,Cablevision Systems Petition at 18-20; BET Petition at 10-11; ARC Petition at 13, 16-17. Continental Cablevision argues that the rule effectively caps an affiliated program channel in its start-up years at a rate slightly below inflation, at a time when advertising dollars are most difficult to obtain. See Continental Cablevision, Inc. petition at 9-10.

[195] See, e.g., E Entertainment Television petition at 5.

[196] In this regard, a number of parties argue that the Commission instituted its affiliated programming restriction without adequate notice and comment as required by the Administrative Procedures Act, 5 U.S.C. § 553, since the rate regulation Notice did not specifically include such a proposal regarding pass-through treatment of affiliated program services. See BET Petition at 4-8; Cablevision Systems Petition at 21-22; Continental Petition at 9.

[197] Cablevision Systems argues that cable MSO operators will resist inflated programming prices from an affiliated programmer if, as a result, they will lose subscribers. They further claim that the benefits that could accrue to a vertically integrated cable MSO from engaging in discriminatory cost-shifting are quite attenuated, since ownership in program services is frequently shared by third parties. Cablevision Systems Petition at 17-18 and

petitioners also assert that the Commission's program access rules, and other rate evasion measures provided for under the 1992 Cable Act, adequately protect against any objectionable cost-shifting behavior without the need for a limit on the recovery of affiliated programming costs.[198]

112. Petitioners propose several different approaches to the treatment of affiliated programming costs. For example, Turner Broadcasting suggests that we only apply our affiliated programming pass-through restriction in cases where there is evidence of discriminatory pricing to affiliated systems and when a program service is primarily distributed to affiliated cable systems.[199] On the other hand, Discovery Communications requests that we allow complete external recovery of all programming cost increases above GNP-PI, regardless of affiliation.[200] Other petitioners suggest that we adopt some sort of transactional safeguards similar to the proposal in the Cost-of-Service NPRM. TCI, Colony Communications and Liberty Media suggest that we allow cable operators to use prevailing company prices, if offered in the marketplace to third parties, to determine programming costs that may be passed-through.[201] Another proposal by Viacom International would permit cable operators to pass-through as affiliated programming costs at least the average increase in nonaffiliated programming expense experienced by

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n. 35.

[198] For example, BET asserts that the FCC's program access rules do not permit programming cost differentials based solely on whether a cable operator is owned by an affiliated MSO. BET Petition at 8-9. See also Booth American Company Petition, at 22; Cablevision Systems Petition at 19-20; E Petition at 4 and n.4

We also note that at least one petitioner criticizes our use of the program access attribution standard for determining whether a program service is affiliated to a cable system. Specifically, Liberty Media Corporation asserts that an operator with only a 5 percent nonvoting or limited partnership interest in a programmer cannot control the programmer's operational decisions when 100 percent of its voting stock is held by third parties. Liberty Media Corporation Petition, at 15-16.

[199] See Turner Petition at 2. Turner also seeks pass-through treatment of costs that constitute bona fide loan payments or return of capital to investors of program services. Turner Petition at 6.

[200] See Discovery Communications, Inc. Petition, at 3.

[201] See TCI Petition, at 23-24 Colony Communications, Inc., Petition, at 11-12; Liberty Media Petition at 17-18.

systems of comparable size without a GNP-PI cap.[202] Telephone companies and municipalities support our treatment of affiliated programming and generally oppose any further expansion of our external cost categories.[203]

113. Where rate regulated industries have the ability and incentive to recover costs of unregulated activities from regulated service subscribers, we traditionally have established safeguards to prevent such improper cost shifting.[204] Accordingly, we conclude that we should maintain in place some type of safeguard.

114. However, we are persuaded by petitioners that a cap on affiliated programming charges could limit operators' ability to recover otherwise fair increases in the costs of programming

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[202] Viacom International, Inc. Petition, at 12.

[203] See Bell Atlantic Petition, at 3-4; GTE Service Corporation Petition, at 15 See also King County Petition, at 3-6 (alleging cable operator's have substantial bargaining power to control programming costs); NATOA, Opposition at 10-14 (arguing against additional external cost categories that would undermine the benchmark scheme).

[204] Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, Report and Order, 104 FCC 2d 958 (1986) (Phase I Order), reconsideration, 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further reconsideration, 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further reconsideration, 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration), Phase I Order and Phase I Reconsideration Order vacated sub nom. Illinois Bell Telephone Co. v. FCC, California v. FCC, 905 F.2d 1217 (9th Cir. 1990), Phase II Order, CC Docket No. 85-229, Phase II, 2 FCC Rcd 3072 (1987), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1989) (Phase II Further Reconsideration Order), Phase II Order vacated sub nom. California V. FCC. 905 F.2d 1217 (9th Cir. 1990) ; Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order), pets. for recon. pending, pets. for review pending, California v. FCC, No. 92-70083 (9th Cir. filed February 14, 1992); Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities & Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Transactions Between Telephone Companies and Their Affiliates, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (Joint Cost Order), recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom., Southwestern Bell Corporation v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

that exceed inflation.[205] As we indicated in the Rate Order, we attach great importance at this stage of rate regulation to the continued growth of programming. On balance, we thus believe that we should adopt an initial regulatory approach that is somewhat more liberal in permitting external treatment of affiliated programming costs. Specifically, we will replace the cap on affiliated programming costs with affiliate transaction requirements of the type proposed by some petitioners and additionally proposed in the Cost-of-Service NPRM.[206] Cable operators may pass-through the costs of affiliated programming that exceed inflation as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.[207] We are amending Section

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[205] C-SPAN has raised the additional point that, while it may be considered to be vertically integrated, it operates as a not-for-profit and necessarily reinvests all revenues received from system operators directly in its own programming operation. This provides an additional ground for reconsidering the affiliated programming limitation with respect to C-SPAN and similarly structured entities.

[206] Some petitioners suggest that the Commission's cost-shifting concerns are unwarranted since the program access rules generally preclude dramatic price differentials between programming sold to both affiliated and nonaffiliated cable systems. However, the program access rules apply only to satellite delivered programming. In addition, the programming access restrictions are not specifically tailored to rate regulation requirements. Accordingly, we will not rely on the program access restrictions as safeguards against unreasonable affiliated programming pass-throughs, or model our affiliated programming safeguards on them.

[207] Cost-of-Service NPRM, at paras. 67-69. TCI seeks clarification of an inconsistency in the Rate Order and the federal register summary. Specifically, the Rate Order states that "programming costs attributable to the program services affiliated with such systems will be capped at the lesser of the annual incremental percentage increase in such costs or GNP-PI." Rate Order, at para. 252. However, the federal register summary states that "programming costs for programming obtained from affiliated entities [is limited] to the percentage change in the admissions component of the Consumer Price Index between the effective date of the price increase and the date the previous price took effect." 58 Fed. Reg. 29736, 29743 (1993). Use of the CPI in the federal register summary was erroneous. However, TCI's concern is now moot since we are today deciding to treat affiliated and nonaffiliated programming the same with respect to measurement of the increased costs we will allow to pass-through. Specifically, we will require

76.922(d)(2)(vi) to reflect this change.[208] We will further examine this issue based on the record obtained in the Cost-of-Service Proceeding and we may refine these requirements in that proceeding, if necessary.[209]

115. We will not modify the attribution standard for identifying affiliated programming services as was suggested by

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adjustments to per channel charges on account of increases in costs of programming obtained from affiliated or nonaffiliated programmers to the extent such increases are greater or less than the GNP-PI for the relevant period. Per channel charges may not be increased if programming costs increase at a rate less than inflation. Permitted per channel charges also shall be decreased to the extent such affiliated or nonaffiliated programming costs decrease from previous levels. See 47 C.F.R. 76.922 (d)(2).

NATOA urges clarification of a similar matter with respect to the inflationary measure of affiliated programming cost increases. In particular, NATOA claims the language of our rule (Section 76.922 (d)(2)(vi)) suggests that a cable operator is permitted to impose as an "external cost" any increase in affiliated programming costs up to the percentage rate increase on overall cable service permitted by the GNP-PI. NATOA states that such treatment is better than that afforded nonaffiliated programming, since a cable operator can only recover increases in nonaffiliated programming to the extent they "exceed inflation." NATOA Petition at 41. In light of our discussion above, we believe NATOA's concerns are also now moot.

[208] See Appendix A.

[209] We also retain jurisdiction of this issue on reconsideration in this docket. We may later address this issue on subsequent reconsideration decisions in this docket. With respect to the APA argument raised by some petitioners (i.e., that we did not provide an opportunity to comment on our affiliated program pass-through proposal), we find these concerns moot. In the Notice, we specifically sought comment on the appropriate ratemaking treatment of "price changes caused by factors outside the operators control" including "increases in...programming costs." Notice, 8 FCC Rcd at 83. This satisfied the APA requirement that an agency give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553 (b)(3). Addressing the sub-issue of affiliate relationships regarding programming costs is well within the scope of the Notice. See para. 16-17, supra. Moreover, the particulars of this revised approach will be refined in the cost-of-service proceeding, where parties will have a further opportunity to comment on the matter.

Liberty Media.[210] We find that use of the 5 percent attribution standard that was adopted in the program access proceeding is appropriate for determining when our affiliate transaction requirements described above should come into play.[211] This measure of affiliation will capture most instances in which ownership relationships between programmers and cable systems could create incentives to pass through excessive costs to cable subscribers. Also, this relatively inclusive attribution standard is warranted in light of our decision to allow the pass-through of reasonable affiliated programming cost increases above the rate of inflation. As with our affiliated programming limitations generally, we may further examine this ownership affiliation standard in the Cost-of-Service Proceeding.

2. Starting Date for External Cost Treatment

116. In the Rate Order, we determined that for all categories of external costs, other than franchise fees and retransmission consent fees,[212] changes in external costs shall be measured from the date on which the system becomes subject to regulation, or 180 days from the effective date of our

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[210] See Liberty Media Petition, at 15, n.6.

[211] In addition to the program access proceeding, the Commission has decided in other contexts that a 5 percent equity interest is an appropriate threshold for determining the point at which ownership in a publicly traded entity may create the potential for influence or control. See, e.g., Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Notice of Inquiry, 2 FCC Rcd 5092 (1987), Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849 (1988), Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991), recon., 7 FCC Rcd 5069, appeal pending sub. nom., National Cable Television Assoc., Inc. v. FCC, No. 91-1649 (D.C. Cir. filed Dec. 26, 1991), Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992), pets. for recon. pending, appeal pending sub. nom., Mankato Citizens Telephone Co. v. FCC, No. 92-1404, (D.C. Cir. filed Sept. 9, 1992).

[212] Rate Order, at para. 255. The benchmark rate level derived from the Commission's survey data has been adjusted to remove franchise fees. Thus, the total amount of franchise fees will be accorded external treatment at the time the system becomes subject to regulation, rather than only the amount of additional franchise fees incurred after that date. Rate Order, at para. 256.

regulations, whichever occurs first.[213] Any changes in external costs occurring prior to that date, including those since September 30, 1992, will not be accorded external treatment. For those systems whose base rate is determined by reference to September 30, 1992 rates, the Commission determined that the permitted rate will be calculated by adjusting rates as of that date forward only for inflation until the date of regulation or 180 days from the effective date of regulation, whichever occurs first. We recognized that precluding external treatment for cost increases over this initial period may unnecessarily encourage cost-of-service showings by those operators who have experienced high external costs during the interim. However, we stated that this approach will save operators the burden of identifying external costs since September 30, 1992.[214] We determined that this approach, instead of permitting addition of external costs from September 30, 1992, would best balance administrative practicality against permitting operators the opportunity automatically to recover external costs.[215]

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[213] The initial date of regulation of the basic tier is the date of local notice that the cable system is subject to regulation. The initial date of regulation of the cable programming services tier will be the date on which a valid complaint is filed with the Commission concerning any cable programming services tier. Rate Order, at para. 255 n. 607; 47 C.F.R. Section 76.922(d)(iv). In the Rate Order, we recognized the likelihood that the initial dates of regulation for the two tiers of cable service may differ, resulting in different initial permitted rates due to different adjustments for inflation and external costs. We stated, however, that these initial dates of regulation should not differ significantly because we anticipate receiving certification forms and complaints concerning the same cable system largely simultaneously. Thus, the initial permitted per-channel rates for the tiers of service should not differ substantially. We stated that differing starting dates for external treatments of cost increases would not undermine our policy of tier neutrality. Rate Order, at para. 255, n. 607.

[214] Id. at 255.

[215] In the Rate Order, para. 255, we observed that only allowing an inflation adjustment from September 30, 1992 until the initial date of regulation may unnecessarily encourage cost-of-service showings by cable operators who experienced high levels of costs in the interim. Our starting date requirements for external costs strike a reasonable cut-off for the inflation adjustment since September 30, 1992 for those operators who do not become subject to regulation until substantially into the future by providing that they may recover actual external cost increases after 180 days from September 1, 1993.

117. Several cable operators object to the starting date for external treatment of costs established in the Rate Order.[216] These commenters argue generally that this approach creates a "gap" period of between one year and 18 months, during which increases in external costs above inflation incurred may never be recovered.[217] Thus, these parties contend that initial benchmark-determined rates may not be compensatory.[218] Discovery argues that the starting date for external cost treatment established in the Rate Order may not serve the public interest goal of expanding cable service because many operators may hesitate to incur certain external cost increases prior to the initial date of regulation, such as programming costs associated with additional channels.[219] These commenters generally favor eliminating the "gap" by establishing a single date on which external treatment of appropriate cost increases may begin, e.g., October 1, 1992,[220] or the effective date of our rules.[221]

118. Under our starting date for external cost treatment, cable operators whose rates are determined by reference to September 30, 1992 rates will be permitted to adjust those rates forward by inflation to the initial date of regulation, or 180

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[216] Discovery Petition at 6-7, and Reply at 9; Colony Petition at 13; Viacom Petition at 14; Blade Petition at 8; Booth Petition at 19; NCTA Opposition at 10; USA Opposition at 6-9.

[217] In light of the Commission's Order advancing the effective date of these rules from October 1, 1993 to September 1, 1993, Order, FCC 93-372 (released July 27, 1993), the earliest possible date of regulation of the basic tier will be October 1, 1993, and of the cable programming services tier will be September 1, 1993. The latest possible date for external treatment of appropriate cost increases on any tier thus will be March 1, 1994.

[218] Discovery Reply at 9. As Booth notes, this can also affect future rates because the initial rate represents the base rate for future adjustments for inflation. Booth Petition at 19.

[219] Discovery Petition at 6-7.

[220] Viacom Petition at 14.

[221] USA Opposition at 6-9; Discovery Reply at 9; Blade Petition at 8. NATOA also urges the Commission to adopt a single date on which regulation of all tiers of cable service will begin, namely, the earlier of the dates on which regulation of any tier would begin under our current rules. However, NATOA is primarily concerned with ensuring that future rate increases on any tier would be subject to the price cap formula, and does not address this suggestion in the context of external costs. See generally NATOA Petition at 36-38.

days from the effective date of our regulations, whichever occurs first, and thereafter may recover increases in external costs. Increasing rates by a general measure of inflation should, on average, permit most cable operators to roughly approximate increases in costs since September 30, 1992. In any event, operators whose costs have increased more than inflation may attempt to recover the costs experienced since September 30, 1992 through a cost-of-service showing. Requiring or permitting external cost treatment through the benchmark process since September 30, 1992 may provide a more accurate measure of external costs for most cable operators but would entail considerably more administrative burden on operators and regulators. In particular, such an approach would entail detailed identification of costs back to that time. In addition, because regulation will be taking place on a tier basis, it would be necessary to track changes in external costs on a tier basis and account for service restructuring and retiering that may have occurred since that time. It would also be necessary to apply our cost accounting and cost allocation requirements back to September 30, 1992. We believe that the administrative difficulties involved in establishing September 30, 1992 as the starting date for external cost treatment outweighs any greater accuracy involved. Accordingly, we will retain the starting date for external costs established in the Rate Order.

3. Frequency of rate adjustments based on increases or decreases in external costs.

119. In the Rate Order, we provided for an annual inflation adjustment to capped rates.[222] We also have indicated in response to formally submitted questions that cable operators should file rates increases no more than once per year.[223]

120. Cable operators argue that permitting rate adjustments based on legitimate changes in external costs only once per year unfairly burdens operators by forcing them to absorb these costs until the next opportunity to file for a rate increase.[224] Cablevision, for example, argues that this "lag" time can be more than a year in some instances.[225] These operators thus argue that cable systems should be permitted to file for rate increases based on changes in external costs as

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[222] Rate Order, at para. 233-240.

[223] Cable Television Rate Regulation Questions and Answers, Public Notice, at 8 (released May 13, 1993).

[224] Continental Petition at 9; Colony Petition at 10; Cablevision Reply at 4.

[225] Cablevision Reply at 4.

such costs arise. These commenters express particular concern over recovering as soon as possible the programming costs associated with adding a new channel.[226] NATOA, on the other hand, expresses general satisfaction with our current rules permitting such rate filings only annually.[227]

121. Limiting capped rates to annual adjustments for increases in external costs clearly would involve lesser administrative burdens on operators and regulators than more frequent filings.[228] On the other hand, annual filings would require cable operators to forego recovery of external costs for up to one year, which could create undue hardships should a system experience a significant increase in costs mid-year. In addition, we note that in an unregulated environment cable operators have generally instituted rate increases only on an annual basis. And, cable operators have incentives to reduce consumer concern over rate increases by not instituting frequent rate increases. For these reasons, we conclude that we need not limit rate increases on account of increases in external costs to an annual basis, although we believe that in the vast majority of such cases increases will occur only once a year.[229]

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[226] Colony Petition at 10; Cablevision Reply at 4. Disney states that our current rules adversely affect its efforts to offer the Disney Channel on a tiered, rather than a la carte basis. Disney contends that cable systems previously committed to adding the Disney Channel to cable programming services tiers are now hesitant because of they are required to absorb the Disney Channel's relatively high programming costs for many months until this additional cost can be recouped through increased cable service rates. Disney thus argues that permitting operators to file for rate increases as new programming is added holds benefits for the subscriber. Disney Petition at 6-7.

[227] NATOA Petition at 11 n.11.

[228] In the Cost-of-Service Proceeding we are also considering how often cable operators will be allowed to file a cost-of-service showing. Cost-of-Service NPRM, at para. 17. We also note that the Medium-Sized Operators have suggested that the Commission, in cost-of-service proceedings, apply external treatment to the costs of rebuilds. Supplemental Comments of the Medium-Sized Operators, Ernst & Young Study, at 13. As discussed above at para. 97, we will address the utility of this approach in the Cost-of-Service Proceeding.

[229] This determination only applies to rate increases on account of changes in external costs. It does not apply to the inflation adjustment to capped rates which shall continue to be limited to an annual filing. For a discussion of filing limitations of on common carriers subject to price cap regulation see Policy and

122. Under our external cost requirements, however, increases in external costs are permitted to be reflected in rates only to the extent they exceed inflation. Increases in external costs thus must be compared to the inflation index. The GNP-PI inflation index is released quarterly and is later updated. We provide that operators may file rate increases no more frequently than quarterly on account of increases in external costs. We also require that where rate increases are made based on a comparison to the initial quarterly inflation index, adjustments must be made in subsequent rate filings to reflect the final index. Our FCC Form 394 and instructions, to be released in the near future, will prescribe the precise manner of making these adjustments. We also will monitor the flexibility we give today to cable operators to make relatively frequent rate increases, and stress that we can impose more stringent limitations at a later date if necessary to protect consumers.

123. We also recognize that cable operators may experience decreases in external costs on a going-forward basis. Prompt reflection of such decreases in rates would benefit consumers. At the same time, a requirement for immediate rate filings to reflect decreases in external costs could significantly increase burdens on operators and regulators. Accordingly, we will not require such rate filings. Instead, we require that any filing to reflect increases in external costs or the annual inflation adjustment must also reflect any decreases in such costs that have occurred over the same period. In addition, we require that operators file revised rates to reflect decreases in external costs no later than one year from when such decreases occur. These requirements will assure that consumers will generally receive the benefits of decreases in external costs within a reasonable time frame without imposing significant burdens on operators.

IV. SECOND REPORT AND ORDER

124. While the Rate Order established a benchmark methodology based on the rates of systems subject to effective competition, the Further Notice sought comment on whether cable systems with less than 30 percent penetration should be included in the "competitive" sample. When data from all systems in the competitive sample were used, the competitive differential was calculated at approximately 10 percent. However, when data from systems with less than 30 percent penetration were excluded from the analysis, a competitive rate differential of roughly 28

Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3022, at para. 307 (1989).

percent was calculated. This result occurs because many of the low penetration systems have rates which were significantly above the rates of other systems in the "competitive" sample.

125. The Further Notice queried whether such low penetration systems could be lawfully excluded from benchmark calculations, given the 1992 Cable Act's definition of such systems as being subject to effective competition. Comment was also sought on whether, as a policy matter, systems in low penetration areas should be excluded or given less weight in calculating the competitive rate differential in order to produce a "better" measure of that differential. In addition, comment was sought on how to redefine the benchmark formula and how to phase-in any further rate reductions if exclusion of such systems were found to be lawful and appropriate. Finally, comment was sought on the impact on consumers and the industry, and the proper application of, any new competitive rate differential.

126. Most commenters contend that the Commission, having chosen to use a benchmark that is designed to approximate the rates that systems subject to effective competition charge for cable service, must use the statutory definition of systems subject to effective competition. Other commenters, however, argue that the Commission is bound by this definition only when determining which systems are exempt from rate regulation.

127. The question at issue, then, is whether the Commission may adopt a definition of systems subject to "effective competition" for purposes of establishing its benchmark rate formula that differs from the definition of that term set forth in the statute. As various commenters noted, this issue is quite similar to the question decided in American Civil Liberties Union v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) ("ACLU"), cert. denied, 485 U.S. 959 (1988). In ACLU, the court held that, notwithstanding the legislative history that seemed to support the Commission's authority to redefine "basic cable service," the statutory definition was itself clear and unambiguous and could not be overridden by legislative history. Id. at 1567, 68. As numerous commenters point out, the 1992 Cable Act also defines "effective competition" in a manner that is clear on its face. Moreover, the commenters have pointed to no legislative history that suggests that the Commission has discretion to redefine that term.

128. We thus conclude that the statutory definition controls when determining reasonable or unreasonable rates pursuant to Section 623 of the Act based on our benchmark

approach.[230] In particular, we believe that, to be most consistent with the clear statutory language, cable systems with less than 30 percent penetration should continue to be included in the sample of systems subject to effective competition which is used to calculate the benchmark rates.[231]

129. Despite the clear statutory language, various commenters argue that rates for low penetration systems, should be excluded from the benchmark formula calculation, because such rates are allegedly disproportionately high. Even if the Act's "effective competition" definition were not binding on the Commission, however, the commenters have not presented convincing arguments as to why low penetration systems should be excluded from the sample. While many commenters speculate about various reasons why systems with less than 30 percent penetration might have higher rates than other competitive systems,[232] there is no factual support for their contentions or upon which the Commission could conclude that exclusion of rates for such systems from the benchmark would produce a "better" measure of the competitive rate differential. In addition, some commenters suggest that defining low penetration systems as subject to effective competition would parallel the antitrust theory that companies with less than 30 percent of the market share do not have monopoly power. This theory holds that without monopoly power, a firm lacks the power to raise prices significantly above cost for any significant period of time. Thus, to the extent that a cable company with less than 30 percent penetration is unable to exert substantial market power, its rates should approximate the rates charged by competitive systems, which also are unable to raise prices substantially above costs. This theory also is consistent both with Congress' concern that cable

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[230] "It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of the term wherever it appears throughout the statute." Florida Department of Banking and Finance v. Board of Governors of the Federal Reserve System, 800 F.2d 1534 (11th Cir. 1987); see also, Board of Governors v. Dimension Financial Corp., 474 U.S. 361 (1986).

[231] See Talley v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977) (agency is not free to rewrite acts of Congress merely because it disagrees with the terms of the statute); Farmers Union Central Exchange, Inc. v. FERC, 734 F.2d 1486, 1500 (D.C. Cir. 1984) (agency decision-making must not only be reasonable but must also be consistent with congressional mandate).

[232] Some commenters speculate, for example, that low penetration may result from new construction which has not yet been fully marketed, from unusually high costs resulting in high prices, and from simple poor management.

systems, in general, were accumulating monopoly power which led to monopoly profits and with its simultaneous decision to include systems with less than 30 percent penetration when defining which systems face effective competition. See Sections 2(a) and 3(a) of the 1992 Cable Act.

130. Moreover, it would not serve the public interest to exclude low penetration systems from the benchmark calculation, as suggested by some commenters, merely because such exclusion would result in larger rate reductions which those commenters seek. Benchmark rates which are 10 percent below prevailing rates in the cable industry will substantially comply with the congressional mandate to ensure that subscribers pay reasonable rates for cable service.[233] Future surveys will gather information on competitive rates as well as system costs, and if greater rate reductions appear appropriate on the basis of such additional information, the Commission will be in a better position to decide the issue at that time. Now, however, based on the instant record, we believe that a more cautious approach in setting cable rates is the better course.

131. Finally, some petitioners and commenters argue that the universe of systems subject to effective competition used in calculating the benchmark rates should not include municipal systems, systems competing with municipal systems or systems involved in head-to-head competition that have been operating for less than five years -- even though each of these systems faces effective competition as defined in the Act. These parties contend that municipal systems do not charge "competitive" rates because they are subsidized by taxpayers, share costs with other municipal services, and do not make a profit. NCTA purported to support these contentions with studies showing that a few municipal systems were subsidized and/or not making a profit. However, these municipal systems responded that the information and assumptions used in the studies were not accurate and that NCTA's conclusions were unfounded. Some parties proffered a study concluding that overbuild systems in operation for less than five years charge lower rates than other overbuild systems. However, even if true, this does not mean that these systems are not viable enterprises in the long term, *i.e.*, making a "profit"

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[233] Some comments reveal a misunderstanding of how the benchmark rates will work. These petitioners contend that they, or others like them, will have to lower their rates 15 to 30 percent to come down to the appropriate benchmark rates. However, the Rate Order made it clear that no system will have to lower its rates by more than 10 percent from its rate level on September 30, 1992. Only systems with extraordinary price increases since that date would face potential reductions of the magnitude suggested by petitioners.

of some kind.[234] Indeed, there is nothing in the record to support the contentions that overbuilt competitive systems of any particular age are engaged in "price wars," and are charging rates that do not allow them to recover costs or otherwise provide for viable operation. Thus, petitioners' speculation concerning the costs and profits of municipal and overbuild systems is not sufficient to warrant their exclusion from the effective competition sample data -- even if the Commission had the discretion to do so. As thoroughly explained in the preceding paragraphs, we do not believe we are free to change the definition of systems subject to effective competition merely because petitioners might devise a definition they think is more appropriate. Since Congress defined municipal systems and overbuilds as subject to effective competition, we will not exclude them from our benchmark analysis.

V. THIRD NOTICE OF PROPOSED RULEMAKING

132. In this Notice, we seek comment on: (1) the appropriate methodology for use of the benchmark to adjust capped rates when channels are added or deleted from a regulated tier; (2) whether we should permit cable operators who have completed rebuilds immediately prior to regulation, and whose rates are below benchmark level, to raise their rates to the benchmark; (3) whether we should permit cable operators to elect either the benchmark or cost-of-service approach for different tiers of regulated service after the initial period of rate regulation; and (4) whether we should permit external cost treatment for costs of upgrades required by local franchise authorities, and, if so, whether local or federal standards should govern rate adjustments based on costs of such required upgrades.

A. Adjustment to Capped Rates Because of Addition or Deletion of Channels.

133. The Rate Order provided that cable operators may pass-through, after the initial regulated rate is determined, any increases in programming costs incurred for regulated services that exceed inflation.[235] The Rate Order, however, did not specify the methodology for using the benchmark approach to determine rates when channels are added or deleted from service offerings.

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[234] There is no indication that Congress intended "profit" to necessarily mean net positive cash flow at all times, as opposed to some other positive return such as increased value of the business, future anticipated profits, or some other valuable consideration.

[235] Report and Order, at paras. 241, 257, n.609.

134. Several cable operators and programmers request further guidance on how an operator seeking to add channels will be able to reflect associated programming costs in rates.[236] They argue that the current benchmark formulation does not allow cable operators to charge an amount sufficient to cover costs for programming to fill new channels, creating disincentives for the addition of new facilities and services that could benefit subscribers.[237] Programmers argue that these disincentives encourage the offering of programming on an a la carte basis.[238] They point out that the benchmark rate applicable to all channels decreases as the cable operator adds channels, and that as the number of channels increase, the break-even cost of any new programming substantially decreases.[239] They argue that a declining per channel benchmark rate as channels are added discourages the development and carriage of higher-quality and higher-cost programming.[240] These parties thus urge the Commission to clarify that channels added by a cable operator after the implementation of rate regulation would not alter the capped rate for existing channels.[241] They further urge that cable operators be permitted to adjust the price of the regulated tier to which the channels are added by an amount reflecting the cost of the new programming plus a reasonable rate of return.[242]

135. Under the regulatory framework adopted in the Rate Order, cable operators may elect between the benchmark and cost-of-service approaches for setting initial regulated rates. Cable operators may use either of these approaches for setting new

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[236] See e.g. Booth American Co., et. al. Petition, at 14; E Entertainment Television, Inc. Petition, at 6.

[237] See e.g., NCTA Comments, at 16-17; Mountain Cablevision, Inc. Petition, at 2; and Booth American, et. al., Petition, at 15. For a more in-depth discussion on how this effects upgrades, see paras. 133-144, infra.

[238] See E Entertainment Television, Inc. Petition, at 2; Discovery Communications, Inc. Petition, at 2 and 7-8.

[239] See e.g., Liberty Media Corp. Petition, at 20-21; Affiliated Regional Communications, Ltd. Petition, at 16.

[240] See e.g., Liberty Media Corp. Petition, at 21; Disney Channel Petition, at 14.

[241] See e.g., Liberty Media Corp. Petition, at 21. Commenters have not offered any suggestions as to how deletions of channels should be handled.

[242] See e.g. Liberty Media Petition, at 21; Affiliated Regional Communications, Ltd. Petition, at 16.

regulated tier rates when channels are added to, or deleted from, either the basic or cable programming services tiers.[243] In the Cost-of-Service Proceeding we are considering requirements that will govern rates for cable service based on costs, including when channels are added or deleted from regulated tiers. In the Rate Order, as indicated, we did not provide specific guidance on how to adjust rates when channels are added or deleted for those operators seeking to use the benchmark approach for rate setting instead of cost-of-service showings. We are therefore offering for comment several approaches to use of the benchmark to determine adjustments to capped rates when channels are added or deleted.[244]

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[243] The Cable Act of 1992 expresses Congress' desire that our rate regulations "reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." Communications Act, Section 623(b)(2)(A), 47 U.S.C. Section 543(b)(2)(A).

[244] A number of parties have raised the issue of whether the external cost adjustment of the benchmark for increases in programing costs should include a mark-up or profit margin on the programing increases. They argue that if programing costs increase faster than inflation, while the remainder of the benchmark rate increases only with inflation, programing costs will over time increase as a percentage of the maximum permitted rate per channel, eroding the cable operator's margin. Several issues are raised by this request. The first issue is whether a markup or profit on additional programing expense is consistent with our policy goal of establishing rates no higher than would prevail under competition. Second, how should we determine the appropriate mark-up? Freezing the margin over programing expense would require benchmark rates to grow at the same rate as programing expenses. Historically, there has been a downward trend in margin over programing expense, as programing expense has grown faster than inflation, while the rate per channel at which cable service is offered has declined. This trend of a declining margin over programing expense does not necessarily imply declining profitability, since at the same time technological improvements have been reducing the per channel operating cost of cable service. The mark-up of programing expense increases should not be inconsistent with this historic trend. A third issue is what cost increases should be marked up. What distinguishes programing expenses from other expenses of cable operators? Should retransmission consent fees (and the fees for channels associated with retransmission consent agreements) be marked up? Arguably the profit associated with broadcast retransmissions is already present in benchmark rates. Should affiliated programing expense increases be marked up? Would this be providing a profit on a profit? Fourth, what would be the impact on programers of allowing a profit margin on increases in programing expense? Would a mark-up on

136. We tentatively conclude that any methodology we adopt should achieve the goals of protecting consumers from unreasonable rates while assuring the continued growth of the cable industry and the additional services that it can provide to subscribers. Thus, the methodology that we select should provide sufficient incentives for cable operators to invest in continued growth of cable television service while not permitting operators to raise rates to unreasonable levels. We solicit comment on these goals and on the extent to which the alternative methodologies described below, or other methodologies, will permit achievement of these objectives.[245]

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programing costs make advertising-supported programing less attractive to operators than fee-supported programing? Would programers attempting to gain audience by offering operators low fees be disadvantaged by a mark-up of programing expense? Would a mark-up on programing expense increases have a material effect on negotiations between cable operators and broadcasters? Fifth, how should we treat advertising and other provisions of programing contracts that affect the level of programing expense? Should total advertising revenues be deducted from programing expense? Should the program promotional expenses of a cable operator be marked up? Should operators receiving different volume discounts on a program have the same or different mark-ups? A sixth issue is whether reductions, as well as increases, in programing expense should be marked up. We note that a programing shift between tiers may cause programing expense to increase in one tier and fall in another, but create no net change in programing expense.

In our Cost-of-Service NPRM we sought comment on whether we should permit a mark-up on programing costs for the development of cost-based rates. We believe that the issue of a mark-up on programming costs accorded external treatment should be resolved with similar issues raised in the Cost of Service NPRM. Accordingly, we will retain jurisdiction over this issue as raised on reconsideration and will resolve it with cost of service issues.

[245] On reconsideration, several parties have suggested modifications to the benchmark to correct alleged defects or that would alter the benchmark level or structure. We will address these suggestions in the Second Reconsideration. Any revised benchmark that we could adopt could affect the methodology that we select for use of the benchmark to adjust rates when channels are added or deleted from regulated tiers. We thus are providing notice that any benchmark methodology that we select will reflect any modifications to the benchmark that we might adopt in the Second Reconsideration. Parties are requested to comment on the appropriate methodology for use of the benchmark to adjust rates when channels are added or deleted in light on the suggestions for modification to the benchmark raised on reconsideration.

137. One proposed methodology for use of the benchmark to adjust capped rates when channels are added or deleted provided that the charge should consist of the sum of: 1) the current permitted charge for the existing channels on the tier; and 2) a charge for the new channels consisting of the benchmark rate for the total number of channels on the tier multiplied by the number of new channels. We tenatively conclude that we should reject this approach, despite its apparent ease of calculation. First, we note that this approach would permit tier pricing above economies of scale observed in the industry survey and reflected in the benchmark. Additionally, there is no apparent analytical or empirical basis for using the benchmark per channel rate for only the new channels on a tier and pricing the old channels on the basis of the pre-upgraded rate.[246] Furthermore, we are not certain that this methodology would work for determining the new permitted rate associated with channel deletions. In addition, this approach could result in significantly higher rates than other options. We solicit comment on our tentative conclusion not to adopt this approach.

138. A second approach would be to require that the new permitted rate for a regulated tier with added or deleted channels would be the benchmark per channel rate based on the new number of channels on the system multiplied by the number of channels on the tier. This approach could require that systems with rates above the benchmark reduce them to the benchmark level when channels are added, including for existing channels. At the same time, It would permit systems with rates below the benchmark to come up to the benchmark level when channels are added. This approach could also be applied to adjust rates when channels are deleted. We tentatively conclude that we should not adopt this approach because it would create substantial disincentives for cable operators with rates above the benchmark to add channels. Conversely, it could create undue incentives for systems with below benchmark rates to add channels, permitting substantially increased rates. We solicit comment on this tentative conclusion.

139. A third approach would be to require that the new permitted per channel rate be the existing permitted per channel rate adjusted for programming expense, as described below, and adjusted to reflect the same proportionate per channel rate increase or decrease observed in the benchmark curve. Under this option, the new permitted per channel rate would not directly reflect the benchmark rate but only the benchmark's proportionate increase or decrease in per channel rates. For example, if the benchmark rate per channel decreases 3% based on the number of

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[246] The benchmark rate is the rate observed in the survey for all regulated channels on the system, not just new ones.

channels the cable operator is adding to a regulated tier, then the cable operator's new per channel rate will also reflect a 3% decrease from current levels, separate from any adjustments for programming expense or other external costs.[247] Thus, this methodology would permit capped rates to maintain their relative position above or below the benchmark, prior to adjustments for external costs.[248]

140. We believe that there may be several benefits to this approach. Maintaining the relative position of current rates to benchmark rates is consistent with the overall treatment of above and below benchmark systems envisioned in the Rate Order.[249] Thus, in the Rate Order we did not require all systems with above benchmark rates to lower rates to the benchmark, or permit those with rates below the benchmark to come up to the benchmark. Under this methodology, these distinctions would be preserved. At the same time, the new per channel rate would reflect the same proportionate per channel rate decreases observed in benchmark rates. This would benefit subscribers by requiring that rates reflect the same efficiencies and economies of scale observed in benchmark rates. Accordingly, we tentatively conclude that we should adopt this third approach.

141. In the Rate Order, we stated that we would permit cable operators to pass through to subscribers increases in programming costs on a going forward basis.[250] We believe that this determination should apply not only to increases in programming costs for channels offered as of the initial date of regulation but to programming associated with additional channels. This will preserve incentives for cable operators to

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[247] Adjustments for external costs, including programming expense, will affect the total final permitted rate.

[248] The question has also been raised as to the correct way to set rates if the operator adds channels merely by "flipping a switch." Here, the operator would be adding channels by activating unused capacity without presumably incurring any significant costs. The benchmark determines rates based on the number of activated channels, subscribers, and number of satellite delivered signals. Because it is based on observed rates of competitive systems with these characteristics, it may be used to determine the permitted rate per channel when new channels are even added when operators do so without incurring significant incremental costs. Accordingly, we propose that operators would be able to apply the described methodology when they add channels by simply activating unused capacity.

[249] See Report and Order, at paras. 177-240 and 382-397.

[250] Report and Order, at para. 251.

provide additional programming services to subscribers. Accordingly, we further tentatively conclude that under the methodology for application of the benchmark to determine rates when channels are added or deleted, we should provide that cable operators may recover the actual increased cost of programming incurred when regulated channels are added to a regulated tier, and that rates must reflect any decreases in programming costs, measured on a per channel per subscriber basis.

142. Benchmark rates per channel presumptively include programming costs because it is reasonable to assume that the rates on which the benchmark is based were set at a level that enabled cable operators to fully recover costs, including those incurred for programming. Therefore, if we permit cable operators to pass-through programming costs when channels are added, and also permit recovery of the full capped rate per channel, the operator would receive a double recovery of programming expense -- the actual amount associated with the channel additions and the amount already included in the capped per channel rate. Accordingly, we tentatively conclude that we should include in our methodology a programming offset for channel additions and deletions that will preclude this double recovery.[251]

143. To illustrate, under the above tentative conclusions, in order to use the benchmark to determine new permitted rates when channels are added or deleted from a regulated tier, cable operators would first identify the level of programming costs for the tier on the initial date of regulation on a per subscriber per channel basis and subtract it from the current permitted per channel rate. The operator would then determine the percentage difference between the benchmark per channel rate for the existing number of channels and the benchmark per channel rate for the new number of channels. This percentage change would then be applied to the previously determined current permitted per channel rate minus programming expenses. The operator would then add its actual programming expense (for both the old and the new channels) determined on a per channel per subscriber basis to this "base" to obtain the new permitted per channel rate.[252] We

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[251] This approach would not accurately reflect programming costs for all cable operators because the benchmark is based on average industry rates and it would require that actual programming costs be deducted from the benchmark. However, this inaccuracy is balanced by the fact, on a going forward basis, that cable operators would be able to recover the actual level of programming expense incurred.

[252] For example, if the current permitted per channel rate is 45 cents and the programming expense on the initial date of regulation is 10 cents measured on a per channel per subscriber

solicit comment on the above described methodology and on whether it would protect consumers while permitting the continued growth and success of the cable industry. Specifically, we seek comment on whether this methodology would provide incentives to cable operators to add programming services, as well as whether the methodology would create disincentives with respect to certain types of programming services.

144. Commenters should provide more than generalized allegations to assist the Commission in determining which method for adjusting benchmark rates will provide sufficient incentives for cable operators to invest in continued growth of cable service.[253] In evaluating the above alternatives for use of the benchmark to adjust capped rates when channels are added or deleted, cable operators and other commenters should provide factual information, including cost data that will provide a firm basis for choosing the best methodology. Commenters should also address the extent to which penetration, subscribership and revenues increase when systems add channels and how such gains should be reflected in rates and our benchmark methodology.

B. Upgrades Initiated Shortly Before Rate Regulation

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basis, the benchmark rate per channel decreases 2 percent between the current and new channels, and the new level of programming expense with the new number of channels is 12 cents measured on a per channel per subscriber basis, the new permitted per channel rate would be 46.1 cents per channel. This general methodology would also apply to channel deletions. If the total number of channels is reduced, however, the final permitted rate would reflect the percentage increase observed in the benchmark rate. It may also be more likely that the final level of programming expense would decrease.

[253] In this respect, the current record should be supplemented. For example, Disney states without supporting factual information, that cable operators will examine their marginal per channel benchmark in determining whether it is economically feasible to add a new program service. Disney Petition at 14-15. In support of its general contention that the benchmark is not compensatory on a going forward basis, Liberty Media merely points out the efficiency factor reflected in the benchmark and observed in our industry survey. Liberty Media Petition at 204. These contentions do not provide sufficient data to warrant a general conclusion that benchmark rates are insufficient to recover expenses of additional channels. Cost information submitted tended to show that the benchmark rate can be compensatory, including a 20 percent return for rebuild costs, before any programming expense. Supplemental Comments of Medium-Sized Operators, Ernst & Young Study at 12, and Attachment 2.

145. Some cable operators with rates below benchmark levels may have initiated or completed system upgrades shortly before rate regulation. It is possible that the initiation of rate regulation could prevent systems with rates below benchmark levels from raising rates to recover such upgrade costs. While cable operators could seek to recover such costs through a cost-of-service showing, we solicit comment and suggestions on alternatives to a full cost-of-service showing that could permit recovery of such upgrade costs. In particular, we solicit comment on whether the streamlined cost-of-service showing proposed in the Cost-of-Service NPRM should be applied in this context. Alternatively, we solicit comment on whether we should simply permit cable operators that have undertaken upgrades shortly before regulation to raise rates to the benchmark level without any cost showing. This would avoid the burdens of cost-of-service determinations while assuring that rates will not rise to above benchmark levels. We solicit comment on appropriate criteria for identifying upgrades that would be eligible for either of these alternatives.[254]

C. Operator Discretion to Select Benchmarking or Cost-of-Service for Different Regulated Tiers

146. The Rate Order did not explicitly state whether cable operator is permitted to choose the cost-of-service approach for one tier and benchmark approach for the other tier, or whether parallel treatment for both tiers is required in setting initial rates. In the Rate Order we established a regulatory framework governing rates for cable service that is tier neutral.[255] The current rule governing the setting of initial rates, Section 76.922(b), may be read to allow the cable operators to elect one showing on one tier and another showing on another tier. A number of interested parties seek guidance on whether systems have discretion to select different rate-setting approaches for different program service tiers.

147. Several cable operators and cable interests state that requiring a uniform selection is undesirable because: 1) it would prevent cable operators from offering a discounted or

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[254] We also request comment on the method of pricing that cable operators generally follow after a rebuild. For example, do cable operators raise rates in a manner that allows them to recoup costs immediately after a rebuild, or, is it a gradual process? What has typically happened to rates, on a per channel and overall basis, when operators have expanded their channel capacity? How much do the various types of rebuilds cost and how have operators in the past recovered those costs? Commenters should provide detailed answers to these issues, with supporting documentation.

[255] See Rate Order, at para. 177.

"lifeline" basic tier service, which they ostensibly would do if they could seek a cost-of-service showing only on the cable programming services tier; 2) it would encourage a greater number of cost-of-service filings for the basic tier, as cable operators that would have been satisfied with a benchmark analysis for their basic tier rates will be required to make a cost-of-service showing on basic in order to make that showing on another tier; 3) it would require cable operators to duplicate the same case before different regulatory bodies; 4) Congress intended different schemes for the different tiers; and 5) since cost structures differ among tiers, a cable operator should be allowed to choose the appropriate regulatory scheme. On the other hand, NATOA contends that cable operators should be required to make parallel showings for both tiers, when both proceedings occur within a reasonable time of each other. NATOA argues that such a requirement would prevent cable operators from "gaming," i.e., deciding whether it would be advantageous to submit a cost-of-service showing on one tier and a benchmark analysis on another. NATOA believes that allowing different showings would undermine the Commission's intention that the same "reasonable" rate determination be made on both tiers. Another petitioner argues that if the Commission adopts a parallel approach to the setting of initial regulated rates, the Commission should conduct a single cost-of-service proceeding, rather than authorize the franchising authorities to hear such cases. According to this commenter, parallel showings will not promote uniform rates on both tiers, because the per-channel, per-subscriber benchmark rate may differ between the tiers, depending upon the initial date of regulation.

148. Based on the record before us at this time, we tenatively conclude that cable operators should be required to elect either the benchmark or the cost-of-service approach for all regulated tiers. Thus, if a system becomes subject to regulation at the local level and seeks to justify its basic service rates using the benchmark system, the reasonableness of its cable programming services rates will also be judged under the benchmark should a complaint be filed about those rates with the Commission. Similarly, if an operator has more than one tier of cable programming services and receives a complaint regarding the rates for all of those tiers, it must justify the reasonableness of each rate using a consistent approach.

149. We believe at this point that requiring operators to use the same rate-setting approach when supporting the reasonableness of various regulated rates during the initial stages of rate regulation best protects our decision to develop a benchmark system based on tier neutrality and also eliminates any incentive to "game" the regulatory process. As noted in the preceding section, we have implemented a benchmark approach based on tier-neutrality in order to simplify the initial rate-setting process, remove a regulatory incentive to retier or move

individual channels from one tier to another, and reduce administrative burdens. If an operator was permitted to elect the benchmark approach for one service tier and cost-of-service for another, however, it would have an incentive to retier its services and place all of its low cost and cost free programming on the tier to which the benchmark will be applied while moving its most expensive programming to the tier for which a cost-of-service showing will be made. In so doing, the operator could be allowed to charge a per channel rate for the low cost tier based on the benchmark (which is an averaged rate) that actually far exceeds its costs for that tier (and, thus, the rate it would be able to charge under a cost-of-service showing). At the same time, the operator may be able to charge a higher-than-benchmark rate for the other service tier through a cost-of-service showing, based on its higher costs for that tier. This result would seriously undermine the rate averaging and tier-neutrality concepts built into the benchmark approach by allowing operators to apply the average per channel rates derived from the benchmark formula only to certain tiers. As importantly, cable operators selectively applying the benchmark system in this fashion would be able to charge higher overall rates than would be allowed if either the benchmark or the cost-of-service approach had been applied consistently across all regulated program tiers.[256]

150. Out of an abundance of caution, to avoid such adverse consequences during the initial stages of regulation, we tentatively conclude that operators should be required to use the same rate-setting approach to justify the reasonableness of all regulated service rates.[257] We recognize petitioners' concerns

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[256] This is because, if the operator had chosen a consistent cost-of-service approach, it would not have been able to charge the benchmark rate for the low cost tier, but rather would have had to charge a lower rate based on its actual costs. Similarly, if the operator had chosen a consistent benchmark approach, it would not have been able to charge an above-benchmark rate for the high cost tier, but rather would have had to charge the benchmark rate.

[257] A selective approach also would allow cable operators to engage in forum-shopping based on an assessment of which jurisdiction would be likely to grant most favorable treatment in a cost-of-service hearing, thus potentially leading to higher rates for subscribers.

We are not persuaded by petitioners' claims that requiring a parallel approach will result in more cost-of-service showings, since it is entirely possible that systems will choose to file fewer cost-of-service showings if they know that they must pursue the same approach for all regulated service tiers. We also are not convinced that an operator would refuse to offer an inexpensive basic tier, as some claim, simply because it was required to submit

that, if they then elect the cost-of-service approach, they will be required to make cost-of-service showings before two different regulatory entities. This possibility, of course, is a function of the Cable Act itself, which gives local franchising authorities primary authority over basic service rates and the FCC exclusive authority over rates for cable programming services. Nonetheless, we are mindful of the difficulties that could result from this situation. Accordingly, we seek comment below on procedures we might implement to coordinate the local and federal regulatory processes as much as possible. In addition, we invite comment on whether our tentative conclusion to require a consistent rate-setting approach is necessary to avoid gaming of the regulatory process and to protect our initial benchmark approach.

151. We also solicit comment on whether we should establish longer term limitations on cable operators discretion to choose between these different alternatives to rate setting, and what those limitations should be. For example, we could require on a permanent basis that cable operators use the same approach for tiers that are concurrently subject to regulation. However, even if we require that the same rate setting approach be used for all regulated tiers, we also believe that cable operators should be permitted reasonable opportunities to switch from benchmarking to cost-of-service, and vice versa. Thus, we could require that operators use the same approach for both tiers within a calendar year but permit them to convert to the other approach after using one approach for that period of time. We solicit comment on whether this alternative is feasible or other alternatives should be adopted. We solicit comment on whether we should not adopt any limitations on operator discretion to elect different approaches for rate setting for different tiers after the initial phase of rate regulation.

152. We also solicit comment on what procedural requirements we should adopt to provide for coordination between local franchising authorities and the Commission if we adopt limitations on operators' ability to select different approaches for different tiers. For example, if a cable operator elects cost-of-service, would there be a need for coordination between the two jurisdictions? What requirements should we adopt, if any, for coordination of cost proceedings at the local and federal level? If a cost proceeding is initiated in one

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a cost-of-service showing for basic service if it chose to do so for cable programming services. Indeed, to the extent petitioners' argument assumes that it may be less expensive to provide basic service than other regulated services, a uniform cost-of-service approach would enable the operator to charge a lower rate for basic (and a higher rate for cable programming services) based on such costs -- the very result petitioners desire.

jurisdiction, and at a later date a different tier becomes subject to regulation, should we provide that the proceedings may proceed independently, or should we take other steps for coordinated or concurrent decision making? Should we require that the determination of one jurisdiction will govern, or be given considerable weight in, setting rates for the tier subject to the oversight of the other jurisdiction? This could reduce administrative burdens on cable operators by, for example, requiring only one cost-of-service showing. It would also promote tier neutrality by assuring that per channel rates based on the same costs or benchmark data will result in the same per channel rates prior to adjustments for external costs.[258] We solicit comment on whether such provisions would be consistent with the local and federal regulation of cable service rates envisioned in the Cable Act of 1992. We note that absent adoption of provisions of this sort, the Commission may rely on established procedures for review by the Commission of local decisions to assure that rate determinations for different tiers are consistent with our rules.

D. Cost of Upgrades Required by Local Franchising Authorities.

153. Finally, we solicit comment on whether we should permit external cost treatment for costs of upgrades required by local franchise authorities.[259] This would be consistent with our general approach of permitting external cost treatment of

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[258] We solicit comment on whether our rate regulations will in any event produce the same per channel rates for different tiers if showings are based on the same costs or the same benchmark data.

[259] There is no basis at this time for modifying the benchmark to include an upgrade variable to govern situations where cable operators upgrade systems that either do, or do not, involve changes in the number of channels offered. The current benchmark determines rates based on only three variables: number of channels, number of subscribers, and number of satellite delivered signals. Without modification to include an upgrade variable, the current benchmark cannot directly determine rates for upgrades any more than for other changes that do not affect the three variables already included in the benchmark, such as, for example, an upgrade of vehicles or increased wages. In addition, the cost of upgrades will vary for each operator depending on the extent and quality of the upgrade making it very difficult to fashion a variable to the benchmark to govern rates when channels are not added or deleted. However, we will continue to explore the feasibility of modifying the benchmark to include an upgrade variable. Finally, cable operators making upgrades that do not affect benchmark variables may either maintain current capped rates or make a cost-of-service showing. The Cost-of-Service Proceeding is considering streamlined procedures for upgrades.

costs of franchise requirements. On the other hand, upgrade costs could be significant and external treatment for such costs could mean in many cases that a significant component of capped rates will be based on costs. This could undermine the benefits that we believe can be achieved by using benchmarks and price caps as the primary method for regulating cable service rates instead of cost-of-service. We solicit comment on these considerations.

154. We also solicit comment on two alternatives for determining the adjustments to rates based on franchise required upgrade costs if we permit external treatment of them. First, we could require that any such costs be governed by the cost-of-service standards that we adopt in the Cost-of-Service Proceeding.[260] This would have the advantage of providing for uniform treatment of such costs for all cable systems. This would also permit the Commission to assure that such standards and resulting rates reflect a federal balancing of goals for regulation of cable service rates. Second, we could permit local franchise authorities to determine the way in which rates would be adjusted to reflect upgrade costs, including over what period of time such costs would be recovered, the operator's profit on upgrade costs, and other issues involved in cost-of-service standards. This option would establish more local control and responsibility for adjustments to rates on account of upgrades. Either of these alternatives could be applied to only the basic tier or to other regulated tiers as well. We solicit comment on these alternatives.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

155. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

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[260] Prior to adoption of requirements in that proceeding, general cost-of-service principles will be applied on a case-by-case basis.

156. Reason for action. The Cable Television Consumer Protection and Competition Act of 1992 requires the Commission to prescribe rules and regulations for determining reasonable rates for basic tier cable service and to establish criteria for identifying unreasonable rates for cable programming services. The Commission has adopted rate regulations that require a comparison to the rates of cable systems subject to effective competition, as defined in the Cable Act of 1992. This Notice proposes to establish regulations governing the setting of rates for regulated cable service based on programming costs.

157. Objectives. To propose rules to implement Section 623 of the Cable Television Consumer Protection and Competition Act of 1992. We also desire to adopt rules that will be easily interpreted and readily applicable and, whenever possible, minimize the regulatory burden on affected parties.

158. Legal Basis. Action as proposed for this rulemaking is contained in Sections 4(i), 4(j), 303(r) and 623 of the Communications Act of 1934, as amended.

159. Description, potential impact and number of small entities affected. Until we receive more data, we are unable to estimate the number of small cable systems that would be affected by any of the proposals discussed in the Notice. We have, however, attempted to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 623(i) of the Cable Act of 1992.

160. Reporting, record keeping and other compliance requirements. The proposals under consideration in this Notice do include new reporting and record keeping requirements for cable systems. These reporting requirements include the possibility of filings by cable operators of financial data annually at the Commission.

161. Federal rules which overlap, duplicate or conflict with this rule. None.

162. Any significant alternatives minimizing impact on small entities and consistent with stated objectives. Wherever possible, the Notice proposes general rules, or alternative rules for small systems, to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers as required by Section 3(i) of the Cable Act of 1992.

VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

163. A final Regulatory Flexibility Act statement was published in the Rate Order at paragraphs 564-574. That analysis remains the same.

VIII. PAPERWORK REDUCTION ACT

164. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

IX. PROCEDURAL PROVISIONS

165. For purposes of this non-restricted informal rulemaking proceeding, members of the public are advised that ex parte contacts are permitted from the time of issuance of a notice of proposed rulemaking until the time a draft Order proposing a substantive disposition of the proceeding is placed on the Commission's Open Meeting Agenda. In general, an ex parte presentation is any written or oral communication (other than formal written comments or pleadings and oral arguments) between a person outside this addresses the merits of the proceeding. Any person who submits a written ex parte presentation addressing matters not fully covered in any written summary must be served on this Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each ex parte presentation discussed above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally Section 1.1231 of the Commission's Rules. 47 C.F.R. §1.1231.

166. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **September 30, 1993** and reply comments on or before **October 7, 1993**. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street N.W., Washington D.C. 20554.

X. ORDERING CLAUSES

167. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 303(r), 612(c) and 623 of the Communications Act of 1934, 47 U.S.C. §§ 154 (i), 154 (j), 303(r), 532 (c), 542(c), and

543, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this Notice of Proposed Rulemaking, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

168. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this Notice of Proposed Rulemaking and Order to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 et seq. (1981).

169. IT IS FURTHER ORDERED that Part 76 of the Commission's rules, 47 C.F.R. Part 76, IS AMENDED, as indicated below.

170. IT IS FURTHER ORDERED that the Petitions for Reconsideration ARE GRANTED in part, DENIED in part, and to the extent that Petitions raise issues unresolved in this Rate Reconsideration, they will be disposed of in future orders.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47, Part 76 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Sec. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101;

47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309; 532; 533; 535; 542; 543; 552; 554, as amended, 106 Stat. 1460.

2. Section 76.911 is amended by revising paragraph (c)(3) to read as follows:

§ 76.911 Petition for reconsideration of certification.

* * * * *

(c) * * *

(3) In any case in which a stay of rate regulation has been granted, if the petition for reconsideration is denied, the cable operator may be required to refund any rates or portion of rates above the permitted tier charge or permitted equipment charge which were collected from the date the operator implements a prospective rate reduction back in time to September 1, 1993, or one year, whichever is shorter.

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3. Section 76.922 is amended by adding a sentence to the beginning of paragraph (b)(1) and by revising paragraph (d)(2)(vi) to read as follows:

§ 76.922 Rates for the basic service tier and cable programming services tier.

* * * * *

(d) * * *

(2) * * *

(vi) adjustments to permitted per channel charges on account of increases in costs of programming obtained from affiliated programmers that exceed inflation as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming.

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4. Section 76.931 is revised to read as follows:

76.931 Notification of basic tier availability.

A cable operator shall provide written notification to subscribers of the availability of basic tier service by November 30, 1993, or three billing cycles from September 1, 1993, and to new subscribers at the time of installation. This notification shall include the following information:

(a) that basic tier service is available;

(b) the cost per month for basic tier service;

(c) a list of all services included in the basic service tier.

5. Section 76.942(c)(1) is amended by removing the reference to June 21, 1993, and by adding September 1, 1993, in its place.

6. Section 76.951(b)(4)(i) is amended by removing the reference to June 21, 1993, and by adding September 1, 1993, in its place.

7. Section 76.953 is amended by revising paragraph (a) to read as follows:

76.953 Limitation on filing a complaint.

(a) Complaint regarding a rate in effect on September 1, 1993. Notwithstanding paragraph (b) of this section, a complaint regarding a rate for cable programming service or associated equipment in effect on September 1, 1993, must be filed by February 28, 1994.

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APPENDIX B

Petitions for Reconsideration

MM Docket No. 92-266

Affiliated Regional Communications, Ltd.
Alaska Cablevision, Inc.
Alsea River Cable TV
Arizona Cable Television Association, et.al.
Atlanta Interfaith Broadcasters, Inc.
Bank of New York
Baraff, Koerner, Olender & Hochberg, P.C.
Bell Atlantic
Black Entertainment Television, Inc.
Blade Communications, Inc.
Booth American Company, et.al.
C-SPAN
Cable Services
Cablevision Systems Corporation
California Cable Television Association
Center for Media Education, et.al.
Century Communications Corp.
Coalition of Small System Operators
Colony Communications, Inc., et.al.
Comcast Cable Communications, Inc.
Community Antenna Television Association, Inc.
Community Broadcasters Association
Continental Cablevision, Inc.
Corning Incorporated; Scientific Atlanta, Inc.
Crown Media, Inc.
Discovery Communications, Inc.
The Disney Channel
E! Entertainment Television, Inc.
Encore Media Corporation
Fairmont Cable
Harron Communications Corp.
Higgins Lake Cable, Inc.
Inland Bay Cable TV Associates
InterMedia Partners
King County, Wash., et. al.
Liberty Media Corp.
Longview Cable Television
Michigan C-TEC Communities
Mountain Cablevision, Inc.
Multichannel Communication Sciences, Inc.
Municipal Franchising Authorities
National Association of Telecommunications Officers and Advisors, et. al.
National Cable Television Association, Inc.
Newhouse Broadcasting Corporation
Northland Communications Corp.
Paradise Television Network, Inc.
Searle, Stanley M.
SuperStar Connection

Sur Corporation
Tele-Communications, Inc.
Time Warner Entertainment Company, L.P.
TKR Cable Company/TKR Cable of Kentucky
Turner Broadcasting System, Inc.
Valuevision International, Inc.
Viacom International, Inc.
Video Data Systems
Video Jukebox Network, Inc.
Wometco Cable Corp.

Comments/Oppositions to Petitions For Reconsideration

Ad Hoc Rural Consortium
Advanced Communications, Inc.
Affiliated Regional Communications, Ltd.
Arizona Cable Television Association
Bell Atlantic
Bellsouth Telecommunications
Bend Cable Communications, Inc., et. al.
Cable TV of Jersey City, Inc.
Cablevision Industries Corporation, et. al.
Cablevision Systems Corporation
Center For Media Education, et. al.
Consumer Electronics Group of the Electronic Industries Association
Consumer Federation of America
C-TEC Cable Systems
Continental Cablevision, Inc.
General Instrument Corporation
GTE Service Corporation
Home Recording Right Coalition
Home Shopping Network, Inc.
King County, et. al.
Liberty Cable Compnay, Inc.
Medium-Sized Operators Group
Michigan Communities
National Association of Telecommunications Officers and Advisors, et. al.
National Association of Towns and Townships
National Cable Television Association, Inc.
National Telephone Cooperative Association
Prevue Networks, Inc.
Time Warner Entertainment Company, Inc.
United States Telephone Association
USA Networks
Valuevision International, Inc.
Viacom International, Inc.
Videomaker Magazine

Replies to Oppositions To Petitions For Reconsideration

Cablevision Industries Corp., et. al.
Cablevision Systems Corporation
Center for Media Education, et. al.
City of Saint Paul
Coalition of Small System Operators
Continental Cablevision, Inc.
Corning Incorporated; Scientific-Atlanta, Inc.
Discovery Communications, Inc.
Engle Broadcasting
King County, Wash., et. al.
Liberty Media Corporation
Medium-Sized Operators Group
Michigan C-TEC Corporation
National Association of Telecommunications Officers and Advisors, et. al.
National Cable Television Association, Inc.
Paradise Television Network, Inc.
Puerto Rico Cable Television Association
State of Hawaii
Sur Corporation
Televista Communicationss, Inc.
Time Warner Entertainment Company, L.P.
United Video, Inc.
Valuevision International, Inc.
Viacom International, Inc.

Separate Statement
of
Chairman James H. Quello

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266.

Today's *Order* represents the Commission's first attempt to reeaxmine the many difficult and complex issues presented by cable television rate regulation. It is evident, however, that what we are doing is incomplete. We expressly reserve a number of important issues for the next phase of reconsideration and seek comment on several new questions.

I would have preferred to resolve these matters all at once. Such an approach would have been more conducive to reasoned decisionmaking. But with the effective date for rate regulation close upon us, it became evident that the Commission would not be able to answer in advance all the issues arising from this major restructuring of the cable industry.

Given this hard fact, we were faced with a choice: should we put off reconsideration altogether until we could resolve all the issues (including the cost of service proceeding), or should we try to answer as many questions as possible before the effective date? The Commission chose the latter course. Although I am not completely satisfied with this bifurcated approach, I believe it was the best choice under the circumstances.

On the other hand, I am more than completely satisfied with the Commission staff's ability to grapple with these difficult issues and produce this document. At a time of year when most of official Washington is on vacation and work flow typically slows to a crawl, these dedicated public servants continued to work the around-the-clock schedule they have shouldered since passage of the Cable Act. Their hard work makes me proud to be Chairman of this agency.

August 27, 1993

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation (First Reconsideration)

This Order on Reconsideration (Order) regarding cable rate regulation takes several actions to affirm the Commission's general approach of establishing (1) a benchmark mechanism to set initial rates for regulated tiers of service, and (2) a price cap for determining permissible rate increases. The Commission also clarifies a number of questions raised in response to the Rate Order,[1] especially regarding certain matters that require decisions prior to the September 1, 1993 effective date for the rate regulations. Finally, we seek additional comment on issues that we will resolve in the Second Reconsideration along with our decision regarding specific suggested refinements to the benchmark mechanism.

I write separately to express my concern that the Commission must remain able to implement cable rate regulations in an orderly and effective manner, especially with respect to providing certainty to consumers and the regulated cable industry on how rate regulation rules will be enforced. In this regard, I emphasize that many questions regarding the specific application of the benchmark mechanism must be resolved at a later date, such that certain conclusions in this Order are necessarily tentative in order to retain the ability to carefully resolve benchmark questions. Indeed, I believe we must have the opportunity to balance consumer, economic, and industry factors in order to avoid unintended consequences from rate regulation, including: (1) reduced levels of cable service; (2) reduced economic activity among programmers, equipment suppliers, and other service vendors; (3) the complete demise of smaller businesses, including cable operators, due to rate regulations; and (4) withdrawal of funding resources for small to mid-size cable businesses.[2]

With respect to phased reconsideration to meet the September 1, 1993 effective date for the rate regulations, I previously stated that the extraordinary demands created solely by the rulemakings on

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[1] Rate Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177, released May 3, 1993, 58 Fed. Reg. 29736.

[2] See Order in MM Docket No. 92-266, FCC 93-372, released July 27, 1993; 58 Fed. Reg. 41042 (Concurring in Part and Dissenting Statement of Commissioner Andrew C. Barrett).

cable rate regulations would make even the former October 1 deadline an ambitious goal, but the additional time would contribute to a more orderly process that would benefit consumers and the industry in the long term.[3] Thus, I would have preferred to avoid the uncertainty created by completing the reconsideration of rate regulation in phases, as well as the potential for unfulfilled expectations by consumers. Nonetheless, to the extent that the earlier effective date forces such a phased approach, I commend the work of my colleagues and the Commission staff in addressing these issues as carefully as possible.

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[3] Id.

*U.S. Government Printing Office: 1994 — 300-842/00013